84-1182

Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1984

THE BOEING COMPANY and
LOGISTICS SUPPORT CORPORATION,
Petitioners,

v.

THE ISLAMIC REPUBLIC OF IRAN and
THE AIR FORCE OF
THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Do the federal courts have the power to expand appellate jurisdiction by exceeding the express jurisdictional limitations for late appeals set forth by Congress in 28 U.S.C. § 2107?
2. Do the federal courts have unlimited power to expand their jurisdiction over late appeals by diluting the strict standard of "excusable neglect" under Rule 4(a)(5), Fed. R. App. P.?
3. Did the Ninth Circuit Court of Appeals improperly depart from the law in other circuits by fashioning a new standard of "excusable neglect" that ignores appellant's lack of due diligence and imposes on appellee the burden of showing specific prejudice from appellant's delay?
4. Should a federal court's sympathy for a tardy appellant's counsel and concern for his malpractice exposure be relevant to the allowance of a late appeal?

PARTIES

The caption identifies all the parties.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit [A1-A6] is reported at 739 F.2d 464 (9th Cir. 1984). This opinion reversed the court's previous opinion [A7-A8] which is not reported. The court of appeal's order denying a petition for rehearing and rejecting a suggestion for rehearing *en banc* [A63-A64] is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered August 2, 1984. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on October 22, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

1. 28 U.S.C. § 2107 (1982). Time For Appeal to Court of Appeals

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
>
> In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it

is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.[1]

2. 28 U.S.C. § 2072 (1982). Rules of Civil Procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

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[1]Effective April 1, 1984, 28 U.S.C. § 2107 was amended to delete the last sentence.

STATEMENT OF THE CASE

This lawsuit was initiated in May 1979 when the Islamic Republic of Iran and the Air Force of the Islamic Republic of Iran ("Iran") sued The Boeing Company ("Boeing") and one of its subsidiaries, Logistics Support Corporation ("LSC"), in the United States District Court for the District of Columbia.[2] Iran sought $75,000,000 in damages for the crash of a Boeing aircraft operated by the Iranian Air Force. Boeing and LSC denied Iran's claims and asserted a series of counterclaims against Iran stemming from Iran's breach of contract obligations to Boeing and LSC. These breaches occurred during a period of revolution in Iran when certain American citizens were held hostage at the United States embassy in Teheran.

On June 2, 1980, the district court dismissed Iran's claims against Boeing and LSC based on exculpatory provisions in the contracts between the parties. The dismissal of Iran's claims was affirmed by the United States Court of Appeals for the Ninth Circuit in August 1983. Boeing's and LSC's counterclaims proceeded to trial in the district court in August 1983. On October 6, 1983, the district court entered a memorandum opinion resolving each of the issues in dispute [A35-A56]. The court also directed the parties to prepare a form of judgment.[3]

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[2]This action, brought under 28 U.S.C. § 1332, was later transferred to the Western District of Washington pursuant to 28 U.S.C. § 1404(a).

[3]The court of appeals' characterization of this judgment as a "near $100 million default judgment" [A-6] creates the impression that Iran was denied the opportunity to contest the merits of Boeing's and LSC's counterclaims. This is not correct. Iran was allowed to contest every issue it desired to contest. The default order that was entered simply precluded Iran from introducing evidence at trial which it had been unwilling to produce prior to trial, despite three court orders compelling its production. Iran did not object to any aspect of the entry of this order because the district court explicitly preserved each of

Boeing, LSC and Iran agreed on a form of judgment and agreed in advance to request the district court to enter that judgment on November 1, 1983. The district court did so and all counsel received prompt notice thereof. The form of judgment provided that there was no just reason for delaying the entry of a final judgment [A57-A60]. The judgment thus became immediately appealable on November 1, 1983.

The time within which Iran was entitled to appeal the final judgment expired on December 1, 1983. As of that date, Iran had not filed a notice of appeal, requested an extension of the filing deadline or otherwise manifested any intention to seek appellate review. Iran then let an additional 13 days go by without taking further action. When Iran finally did take action, it was not in the United States courts. On December 14, 1983, Iran approached the Iran-United States Claims Tribunal in The Hague, the Netherlands (the "Claims Tribunal") and moved that body to order the "termination" of all legal proceedings involving Iran, Boeing and LSC in the courts of the United States [A65-A73].[4] It was not until eight days after that motion was filed and 21 days after the appeal period expired that Iran first revealed any interest in appealing the judgment below. On that date, Iran moved the district court for an extension of the appeal deadline pursuant to Rule 4(a)(5), Fed. R. App. P. [A82]. In its motion, Iran claimed that its failure to file a timely notice of appeal resulted from "excusable neglect" because one of its numerous counsel of record, Thomas Smith, had been home ill on the last two days of the filing period.

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the liability and damages issues that Iran desired to contest. The actual amount of the judgment was $70,909,697.

[4]The Iran-United States Claims Tribunal was created pursuant to a series of executive agreements between the governments of the United States and Iran, known collectively as the "Algerian Accords."

Although this lawsuit was litigated in Seattle, Iran had retained Thomas Smith, Gerald Sterns and their San Francisco law firm of Sterns, Smith & Walker to represent its interests. This firm associated the Seattle law firm of Schweppe, Doolittle, Krug, Tausend & Beezer to assist in the representation of Iran and to comply with GR 2(d) of the Local Rules of the Western District of Washington [A83-A85]. Those rules require local counsel to sign all pleadings in the case and to be prepared to handle the matter if the nonadmitted counsel is unavailable.

According to Mr. Smith [A86-A90], the circumstances leading to Iran's missing the filing deadline were as follows: (1) Each of Iran's counsel knew that final judgment was entered on November 1, 1983 and that the time to appeal would expire on December 1, 1983; (2) Iran instructed its counsel to file a notice of appeal "as late as possible"; (3) Mr. Smith prepared and signed a notice of appeal and kept it in his office, planning to dispatch it by express mail from San Francisco on November 30, 1983 so that it would arrive at the district court in Seattle on December 1, 1983, the last day of the appeal period; (4) Mr. Smith was at home ill on November 30, 1983 and never thought to contact anyone in his office or in the office of Iran's Seattle counsel concerning the notice of appeal; and (5) the filing deadline passed and no one filed the notice of appeal.

None of the attorneys or staff in Mr. Smith's office took any action in his absence to perfect Iran's appeal. Similarly, Iran's counsel in Seattle took no action and made no inquiries of any kind during the critical time period. After returning to his office on December 5, 1983 and discovering that no notice of appeal had been filed, Mr. Smith still took no action for a considerable period. He allowed an additional 17 days to pass before notifying the district court and Boeing's counsel of Iran's intention to belatedly seek appellate review of the final judgment—which by then was 51 days old. In the meantime, Iran had been aggressively seeking an order from the Claims Tribunal to compel the "termination" of these proceedings and prevent the enforcement of

Boeing's and LSC's final judgment.

Boeing and LSC opposed Iran's motion for extraordinary relief for two reasons. First, Iran's explanation of its conduct did not establish "excusable neglect" under Rule 4(a)(5). Second, Iran's actions in the Claims Tribunal demonstrated that it did not intend to proceed with this appeal in good faith. Rather, Iran's effort to belatedly revive the United States proceeding was an afterthought designed to create some type of legal proceeding in the United States which could be "terminated" or stayed by order of the foreign Claims Tribunal.

Over Boeing's and LSC's objection, the district court granted Iran's motion for extraordinary relief to commence a late appeal [A9-A30]. In rendering its oral decision, the district court focused on two factors. First, the court emphasized that Mr. Smith had conducted himself in a gentlemanly fashion throughout the litigation. Second, the court expressed concern that Mr. Smith might be faced with substantial malpractice exposure as a result of missing this filing deadline [A28-A29]. At the same time, the district court indicated that Iran's attempts in the Claims Tribunal to collaterally attack the legitimacy of this legal proceeding did not have any bearing on the court's analysis [A18].

Sixty-four days after entry of final judgment, Iran filed its belated notice of appeal [A91-A92] and Boeing and LSC filed a separate cross-appeal of the district court's order extending the appeal period [A93-A94]. Boeing and LSC immediately filed a motion to dismiss Iran's appeal as untimely and the court of appeals *granted* that motion on February 7, 1984. The court of appeals held that the explanation Iran had provided to the district court "did not demonstrate excusable neglect" and that "the grant of an extension of time under Fed. R. App. P. 4(a)(5) was unwarranted" [A7-A8].[5]

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[5]While the motion to dismiss Iran's appeal was pending in the court of appeals, the district court entered a written order confirming its oral ruling on Iran's

On reconsideration, the same motions panel reversed itself and reinstated Iran's appeal. The panel this time held that "excusable neglect" was conclusively established by Mr. Smith's brief illness at home.[6] The panel did not consider it important that Iran had other counsel of record who were perfectly capable of filing a simple, one-page notice of appeal. The panel dismissed this fact with the observation that Mr. Smith was Iran's "active" counsel [A5]. The panel then emphasized that Boeing had not demonstrated any prejudice from Iran's lateness in filing its appeal [A6]. Finally, the panel placed significance on the size of the judgment below [A6]. The panel ignored Iran's attempts in the Claims Tribunal to subvert the very appellate proceedings it was seeking to revive, ignored Iran's deliberate decision to delay filing an appeal and ignored Iran's unwarranted and unexplained delay in moving for an extension of time.

Boeing's and LSC's motion for *en banc* rehearing of this latter decision was denied on October 22, 1984 [A63-A64]. As a result, Boeing's and LSC's appeal (docket number 84-3558) was dismissed and a corresponding mandate [A61-A62] affirming the district court order was issued. Iran's appeal of the district court's final judgment on the counterclaims (docket number 84-3542) is once again pending in the court of appeals.

Rule 4(a)(5) motion [A31-A34]. A copy of this order was immediately provided to the court of appeals and it was available to the motions panel when it dismissed Iran's appeal.

[6]The most that Mr. Smith alleged was that "due to my illness I did not think about the need to file the notice of appeal while confined to bed" [A88]. He was simply home with the flu for a few days, with normal symptoms, and did not "think" about the notice of appeal. The courts below converted this assertion into a conclusion that Mr. Smith was "physically and mentally incapacitated" [A34, A4].

REASONS FOR ALLOWING THE WRIT

1. The Ninth Circuit's Decision Is an Improper Expansion of Appellate Jurisdiction in Direct Conflict With Jurisdictional Limitations Established by Congress in 28 U.S.C. § 2107.

This petition raises the question of whether the federal courts are empowered to expand their appellate jurisdiction in direct conflict with jurisdictional limitations established by Congress in 28 U.S.C. § 2107. This is a question of substantial importance that requires review by this Court.

This Court has uniformly held that the timely filing of a notice of appeal is mandatory and jurisdictional. In *United States v. Robinson*, 361 U.S. 220, 229 (1960), this Court held:

> The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional.

See also Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982) ("It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.' "). In *Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 264 (1978), this Court enunciated this rule and explained its purpose:

> Under Fed Rule App Proc 4(a) and 28 USC § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. This 30-day time limit is "mandatory and jurisdictional." . . . The purpose of the rule is clear: It is "to set a definite point of time when litigation shall be at an end,

> unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."[7]

In 28 U.S.C. § 2107, Congress established the jurisdictional limitations for filing appeals in civil cases in the federal courts. The statute requires a litigant to file a notice of appeal within 30 days of the entry of final judgment. The statute reflects Congress' intention that district courts should have only limited discretion to extend this time for appeal. The statute gives that discretion only

> upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

28 U.S.C. § 2107. Significantly, Congress chose not to allow any other exceptions to the strict requirement of a timely notice of appeal.

These Congressional limitations on appellate jurisdiction were clearly exceeded by the Ninth Circuit's decision to accept Iran's late appeal. Iran's notice of appeal was not filed until 64 days after entry of final judgment. The district court had no discretion to allow this late filing because the only excuse allowed by the statute for a late appeal was clearly inapplicable. Each of Iran's counsel not only had timely notice of entry of judgment, they knew well in advance of the entry of judgment the exact date that it would be entered. These facts were undisputed. Nevertheless, the district court permitted the late appeal to proceed, and the Ninth Circuit ultimately affirmed.

The courts below were simply not empowered to accept a late appeal that was jurisdictionally defective under 28 U.S.C. § 2107.

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[7]Quoting *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943).

This Court has long held that the federal courts have no authority to exceed jurisdictional limitations prescribed by Congress. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181-82 (1955)), the Court held:

> The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. . . . This Court . . . is not authorized to approve or declare judicial modification. *It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system.* . . . Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money. The choices fall in the legislative domain.

(Emphasis added.) *Accord United States v. Sherwood*, 312 U.S. 584, 590 (1941); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850).

The direct conflict between the decisions below and section 2107 cannot be eliminated by reference to Rule 4(a)(5) of the Federal Rules of Appellate Procedure. While Rule 4(a)(5) vests the district courts with discretion to extend the time to appeal for "excusable neglect" or "good cause," those terms are not otherwise defined in the rule [A82]. Prior to 1966, "excusable neglect" was limited by the rule to the same circumstances set forth in section 2107—the failure of appellant to receive notice of the entry of judgment. This definition was removed by the 1966 amendments to original Federal Civil Rule 73(a)—the predecessor of present Rule 4(a)(5). The Advisory Committee Notes suggest that Rule 73(a) was amended in order to increase the district court's very limited discretionary power to extend

the time to appeal under section 2107.[8]

Despite the apparent intent of its drafters, Rule 4(a)(5) cannot have this effect.[9] Court rules cannot overrule or supersede Congressional enactments which establish the scope of federal jurisdiction. 28 U.S.C. § 2072 conferred upon this Court broad authority to prescribe rules of a procedural nature, and such rules were intended under the statute to supersede inconsistent procedural requirements in Title 28. However, it is well recognized that this rule-making authority cannot be used to "enlarge or diminish" the jurisdiction of the federal courts. *United States v. Sherwood*, 312 U.S. 584, 590 (1940). And there is no question that the discretionary allowance of late appeals is equivalent to expanding appellate jurisdiction. This Court ruled in *United States v. Robinson*, 361 U.S. 220, 224 (1960) "that to recognize a late notice of appeal is actually to 'enlarge' the period for taking an appeal."

The Federal Rules of Appellate Procedure themselves also make it clear that they do not extend the jurisdiction of the federal

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[8]This interpretation is also supported by Professor Moore, a member of the Committee overseeing the Advisory Committee, who regards 28 U.S.C. § 2107 as "obsolete" in view of the adoption of Rule 4(a)(5). 9 *Moore's Federal Practice* ¶ 204.07 (1983). This assessment of the continuing vitality of 28 U.S.C. § 2107 is not shared by Congress, which amended the statute in several respects which became effective just last year (92 Stat. 2682 (1978)) and enacted legislation that expressly incorporated section 2107 in 1974. 88 Stat. 1970 (1974). Nor is this view apparently shared by this Court, which cited the statute in *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384-85 (1978), and in *Browder*, 434 U.S. at 264. *See also In re Shannon*, 670 F.2d 904, 906 (10th Cir. 1982). In any event, it is up to Congress to determine whether jurisdictional limitations are "obsolete."

[9]The federal rules are not immune from review by this Court: "The fact that this Court promulgated the [Federal Rules of Civil Procedure] as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency." *Mississippi Publ. Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

courts. Rule 1(b) [A95] provides:

> These rules shall not be construed to extend or limit the jurisidiction of the courts of appeals as established by law.

Yet this is precisely the effect of the construction given Rule 4(a)(5) by the Ninth Circuit in this case.

There is an additional reason why Rule 4(a)(5) should not be interpreted to overrule or supersede the jurisdictional statute. The Supreme Court's rule-making authority is limited by Congress in section 2072:

> Such rules shall not abridge, enlarge or modify any substantive right . . . .

This Court has recognized the right of prospective appellees to expect "a definite point of time when litigation shall be at an end" and to be advised that they are "freed of the appellant's demands." *See Browder*, 434 U.S. at 264. The appellate rules should not be interpreted to abridge that substantive right.

In the final analysis, the Ninth Circuit's decision purports to transform Rule 4(a)(5) from a procedural rule, or a housekeeping measure, into a vehicle for expanding federal jurisdiction—something which this Court has always said cannot be accomplished by a court rule. As this Court emphasized in *Schacht v. United States*, 398 U.S. 58, 64 (1970), it is crucial to distinguish jurisdictional limitations enacted by Congress from rules promulgated by the Supreme Court "for the orderly transaction of its business." The latter can be relaxed by the Court in the exercise of its discretion, whereas the former cannot. Justice Harlan, concurring in *Schacht*, put it simply:

> Because we cannot "waive" congressional enactments, the statutory time limits are treated as jurisdictional.

398 U.S. at 68. The statutory time limits embodied in 28 U.S.C. § 2107 are jurisdictional. The court of appeals cannot "waive" this Congressional enactment or ignore it in favor of a more liberal, court-made rule.

2. Even if Rule 4(a)(5) Supersedes 28 U.S.C. § 2107, the Ninth Circuit's New Interpretation of That Rule Conflicts With the Law in the Other Circuits and the Law Established by This Court.

Even if the jurisdictional limitations set forth by Congress in 28 U.S.C. § 2107 have been superseded by Rule 4(a)(5), that does not mean that the federal courts have unlimited discretion to open their doors to tardy appellants. There must be objective and enforceable limits on the district courts' power to allow late appeals. The Ninth Circuit's decision below dilutes the excusable neglect standard to the point that it is virtually meaningless. This decision thus paves the way for a dramatic increase in the number of late appeals at a time when the dockets of the courts of appeals and the Supreme Court are already seriously overcrowded. *See* Griswold, *Helping the Supreme Court by Reducing the Flow of Cases into the Courts of Appeals*, 67 Judicature 58 (1983). In this regard, the decision conflicts with the law in the other circuits and undermines the principle of finality which is the goal of Rule 4(a). Because these issues are critical to the proper and uniform administration of the Federal Rules of Appellate Procedure, this Court should grant certiorari.

Prior to its August 2, 1984 decision in this case, the Ninth Circuit Court of Appeals had always interpreted Rule 4(a)(5) strictly, to preserve the finality of judgments and thereby increase the confidence of litigants in the orderliness and conclusiveness of the judicial process. *See, e.g., Meza v. Washington State Department of Social & Health Services*, 683 F.2d 314 (9th Cir. 1982); *In re Estate of Butler's Tire & Battery Co.*, 592 F.2d 1028 (9th Cir. 1979); *Selph v. Council of Los Angeles*, 593 F.2d 881 (9th

Cir. 1979); *Sprout v. Farmers Insurance Exchange*, 681 F.2d 587 (9th Cir. 1982); and *Oregon v. Champion International Corp.*, 680 F.2d 1300 (9th Cir. 1982). In this regard, the Ninth Circuit was generally in harmony with the other circuits which have historically interpreted Rule 4(a)(5) very narrowly.[10]

The strictness of the excusable neglect standard was stressed in *Meza, supra*:

> We reemphasized recently the strict standard for approving an extension of time for excusable neglect. We warned:
>
> > Extensions of time for appeal should not be granted absent the moving party's failure to learn of the entry of judgment or extraordinary circumstances where injustice would otherwise result.

683 F.2d at 315 (quoting *National Industries, Inc. v. Republic National Life Insurance Co.*, 677 F.2d 1258, 1264 (9th Cir. 1982)). This strict interpretation of the excusable neglect standard has advanced the primary purpose of Rule 4(a)(5), which the Supreme Court said is

> to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective

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[10]Enforcing that strict standard has frequently required appellate courts to reverse district court orders finding excusable neglect under Rule 4(a)(5), or predecessor Rule 73(a). *See, e.g., Airline Pilots in Serv. of Executive Airlines, Inc. v. Executive Airlines, Inc.*, 569 F.2d 1174 (1st Cir. 1978); *Files v. City of Rockford*, 440 F.2d 811 (7th Cir. 1971); *Gooch v. Skelly Oil Co.*, 493 F.2d 366 (10th Cir.), *cert. denied*, 419 U.S. 997 (1974); *Fase v. Seafarers Welfare & Pension Plan*, 574 F.2d 72 (2d Cir. 1978); *Pellegrino v. Marathon Bank*, 640 F.2d 696 (5th Cir. 1981); and *Winchell v. Lortscher*, 377 F.2d 247 (8th Cir. 1967).

> appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose.

Browder, 434 U.S. at 264 (quoting *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943)). *See also Files v. City of Rockford*, 440 F.2d 811 (7th Cir. 1971). Prospective appellees Boeing and LSC rightfully assumed in this case that they were "freed of the appellant's demands" when the 30-day appeal period expired on December 1, 1983. Under the Ninth Circuit's new interpretation of Rule 4(a)(5), such an assumption is no longer valid. This decision effectively discards the strict objective test for excusable neglect and replaces it with a loose subjective standard. If this relaxed interpretation is allowed to stand, late appeals will no longer be rare or extraordinary—they will become routine.

The Ninth Circuit's decision departs from the law in other circuits and the law of this Court in at least four important ways. *First*, the decision imposes on the appellee the burden of showing that he was prejudiced by the late filing of the notice of appeal. *Second*, the decision allows the appellant to establish excusable neglect by explaining the inaction of one lawyer, without requiring any explanation for the inaction of the appellant's other lawyers. *Third*, the decision fails to consider due diligence, or the lack thereof, on the part of the appellant seeking to establish excusable neglect. *Fourth*, the decision fails to consider the appellant's lack of good faith in belatedly initiating appellate proceedings. These points are addressed separately below.

(a) **Prejudice**

In its August 2, 1984 opinion, the Ninth Circuit stated that "the district court's finding of excusable neglect is sustainable only if there were extraordinary circumstances that prevented a timely filing and *denying the appeal would result in injustice.*" (Emphasis supplied.) [A2]. Only the last sentence of the opinion addressed the question of injustice, the second prong of the excusable neglect test. The opinion states:

> Finally, the appellees do not claim any prejudice from allowing a late notice of appeal, and we think it would be unjust to preclude an appeal from the district court's near $100 million default judgment.

In this one sentence, the Ninth Circuit has introduced a new requirement for the enforcement of the filing deadlines set forth in 28 U.S.C. § 2107 and Rule 4(a). This new requirement is not only contrary to this Court's decision in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982), it is virtually impossible for any appellee to satisfy. The prejudice to an appellee who is summoned to respond to an untimely appeal is apparent on its face. *See Browder*, 434 U.S. at 264. Rarely, if ever, will the appellee be able to establish any additional prejudice associated with a delay of days or weeks between the expiration of the appeal period and the receipt of a Rule 4(a)(5) motion. To create such a requirement turns the finality rule on its head.

In *Griggs*, the Third Circuit refused to enforce the jurisdictional filing requirements of Rule 4(a)(4) because the appellees were unable to show that they were prejudiced by the premature filing of a notice of appeal. On certiorari, this Court reversed, noting that the Third Circuit's analysis of Rule 4(a)(4) conflicted with the decisions of other circuits and was contrary to the language and purposes of the 1979 Amendments to the Federal Rules of Appellate Procedure. The Ninth Circuit's attempt to insert a prejudice requirement into Rule 4(a)(5) should be rejected for similar reasons. Whether injustice would result from stricter enforcement of the timeliness requirements of Rule 4(a) in a particular case should depend on the diligence and good faith of the appellant seeking extraordinary relief under the rule. It should not depend on the degree of prejudice suffered by the appellee as a result of the late filing.

(b) **Multiple Lawyers**

Iran's only excuse for failing to file a timely notice of appeal is the brief illness of one of its lawyers, Thomas Smith, at the close

of the appeal period. No explanation was offered for the inaction of Mr. Smith's partners and associates at Sterns, Smith & Walker or for the inaction of Iran's counsel of record in Seattle. It is the law in the other circuits that a party cannot establish excusable neglect by tendering an excuse for the inaction of one lawyer when there are other lawyers representing the prospective appellant who are capable of preparing and filing a simple, one-page notice of appeal. *See, e.g., Gooch v. Skelly Oil Co.*, 493 F.2d 366, 370 (10th Cir.), *cert. denied*, 419 U.S. 997 (1974); *Buckley v. United States*, 382 F.2d 611, 614 (10th Cir. 1967), *cert. denied*, 390 U.S. 997 (1968); *Flett v. W.A. Alexander & Co.*, 302 F.2d 321, 323 (7th Cir.), *cert. denied*, 371 U.S. 841 (1962). In each of these cases, one lawyer stepped forward to shoulder the blame for the missed deadline by characterizing himself as "lead" or "chief" counsel. The courts, however, have uniformly rejected such attempts to explain late filings, even in cases where one of the appellant's lawyers became physically incapacitated.

> The physical incapacity of one of the two lawyers representing plaintiff does not entitle plaintiff to relief on the grounds of "excusable neglect" in the absence of a strong showing that other counsel could not have acted for him under the circumstances then existing.

Flett, 302 F.2d at 323.

The Ninth Circuit reached just the opposite conclusion in this case and did so without citation to a single supporting decision. The Ninth Circuit opinion attempts to distinguish the contrary authority from other circuits by suggesting that Mr. Smith was the only lawyer "actively" representing Iran [A5]. This new "active" lawyer test should not be allowed to stand. *First*, this rationale, because it is so easily manufactured, can be urged by virtually any tardy appellant who misses the filing deadline. *Second*, counsel of record hardly need be the most "active" in the case in order to file a simple notice of appeal. *Third*, in this case,

it was a violation of local court rules for Iran's Seattle counsel to be "inactive." Indeed, Mr. Smith's intention to file Iran's notice of appeal directly with the court would have been a clear violation of those rules because the signature of Iran's Seattle counsel on the notice was required. Incredibly, the Ninth Circuit dismisses this violation because Iran had gotten away with a prior violation of the rule earlier in the case. If Iran had simply followed the applicable local rule, it would not have missed the filing deadline.

(c) **Due Diligence**

The Ninth Circuit opinion does not acknowledge or address the complete lack of diligence by Iran and its attorneys in failing to file a timely notice of appeal. This lack of diligence is reflected in Iran's conduct both before and after the appeal period expired. First, in an effort to achieve a perceived tactical advantage, Iran intentionally allowed the first 28 days of the 30-day appeal period to expire without making any effort to file a notice of appeal. This conscious decision to encounter the risk of missing such a critical deadline cannot be characterized as "excusable neglect." *See H.L. Smith, Inc. v. Allied Chemical Corp.*, 564 F. Supp. 377, 379 (M.D. La. 1983) ("The plaintiff had 30 days to file the notice of appeal. Counsel chose to wait until the last day to file the notice. Such actions cannot be said to be excusable neglect"). Iran not only had no excuse for allowing the first 28 days of the appeal period to pass without action, it admitted that this delay was intentional.

Second, Iran consciously waited 17 days after discovering that the appeal deadline had passed before expressing, formally or informally, any intention to pursue a late appeal. The panel of judges which rendered the opinion below completely ignored this fact, despite the Ninth Circuit's *en banc* determination in *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) that "prompt filing of a motion after actual notice" is relevant to establishing excusable neglect under Rule 60(b), Fed. R. Civ. P. Although *Rodgers* dealt with the importance of diligence in the context of a request for extraordinary relief under Rule 60(b), the rationale applies

equally to those seeking extraordinary relief under Rule 4(a)(5). As this Court pointed out in *Baldwin County Welcome Center v. Brown*, ____ U.S. _____ , 104 S. Ct. 1723, 1726 (1984), "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *See also Pasquale v. Finch*, 418 F.2d 627 (1st Cir. 1969).

The circumstances of this case stand in stark contrast to the circumstances in those very rare cases where appellate courts have approved the extension of the appeal period on grounds of excusable neglect. Generally, this relief is available only when the appellant is not notified of the entry of judgment or is misled by actions of the district court. *See, e.g., Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962); *National Industries, Inc. v. Republic National Life Insurance Co.*, 677 F.2d 1258 (9th Cir. 1982). *See also Fallen v. United States*, 378 U.S. 139 (1964) (where a criminal defendant confined to a federal hospital failed to file notice of appeal within 10 days after sentencing, despite having done all he could to give notice within the required period).

It is important to remember that this is not a case where the appellant failed to receive timely notice of the entry of judgment. Nor is it a case where the appellant relied to its detriment on an order or statement by the district court. Nor is it a case where a criminal defendant or indigent litigant was denied access to competent counsel. Nor is it a case where the appellant acted promptly to cure its default after discovering that the appeal period had expired. It is simply a case where a litigant took a calculated risk of missing the deadline in hopes of gaining a tactical advantage in the litigation. The circumstances leading to Iran's failure to file a timely notice of appeal were of Iran's own making, and there is no reason why the federal courts should make extraordinary allowances to protect Iran from the consequences of its own acts.

(d) **Good Faith**

Iran's lack of diligence, as described in the preceding section, is a telling indication of Iran's lack of good faith in belatedly initiating these appellate proceedings. The 17-day delay following Mr. Smith's recovery is best understood when viewed in the context of Iran's initial response to the entry of a final judgment favorable to Boeing and LSC. The first thing Iran did after the judgment became final and unappealable was to collaterally attack that judgment in the Claims Tribunal at The Hague [A65-A73]. Iran continued to press this attack even after the district court granted its motion for extraordinary relief to file a late appeal under Rule 4(a)(5) [A74-A81]. Since its motion in the district court was not filed until eight days after its motion in the Claims Tribunal, it is apparent that Iran decided that the prospects for tying up Boeing's final judgment would be enhanced if there were appellate proceedings still under way in the United States.

Iran's motivations for initiating this late appeal should have been of central importance to a court called upon to decide whether "injustice" would result if this late appeal were disallowed. Yet the district court stated that Iran's conduct in the Claims Tribunal could not be considered [A18] and the Ninth Circuit neglected even to mention this conduct in its opinion [A1-A6]. This has led to an anomalous result. The district court and the Ninth Circuit have granted Iran the extraordinary privilege of initiating an appeal outside the mandatory time period, on the ground that injustice would otherwise result, even though Iran chose first to collaterally attack the legitimacy of this very same legal proceeding in another forum.

If the Ninth Circuit opinion is allowed to become law, the extraordinary privilege to pursue an untimely appeal will not even require good faith on the part of the appellant. The principle of finality which underlies Rule 4(a) and 28 U.S.C. § 2107 deserves greater consideration than it was given by the Ninth Circuit in this important respect.

3. The Court's Sympathy for Appellant's Counsel and Its Concern for His Malpractice Exposure Are Not Relevant to the Excusable Neglect Standard Under Rule 4(a)(5).

In view of Iran's lack of diligence and lack of good faith, it is hard to imagine why the district court would have been inclined to grant extraordinary relief under Rule 4(a)(5). This apparent contradiction was explained by the district court itself when it ruled orally on Iran's motion. Speaking to Mr. Smith, Iran's lawyer at the argument, the court made the following remarks after acknowledging the strictness of the legal standard for excusable neglect:

> But I feel strongly that trial lawyers should conduct themselves as gentlemen, and you have done that throughout this proceeding, as has counsel for Boeing. And it would, in my view, be tragic if you were to be confronted with a malpractice situation as a result of the failure to file this notice of appeal due to your illness.

[A29]

* * *

> But I want to say to you, Mr. Smith, that had you conducted yourself differently during the course of this litigation I might very well have ruled differently.

[A28]

Boeing's and LSC's fundamental right to rely on the finality of an unappealed final judgment should not be ignored simply because Iran might commence a malpractice action against one of its lawyers. By affirming the district court's decision, the Ninth Circuit has placed its imprimatur on the arbitrary use of Rule 4(a)(5) powers to reward counsel, or conceivably to punish them, for their conduct during the pendency of the litigation. Obviously, there are more appropriate ways to control attorney conduct than this.

The confidence which litigants can have in the finality of judgments in the Ninth Circuit has been seriously jeopardized by this

EDITOR'S NOTE

PAGES A-1 thru A-15 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

district court's order granting an extension of time in which to file an appeal.

Rule 4(a)(5) of the Federal Rules of Appellate Procedure permits the district court to extend the time for filing an appeal on a showing by the moving party that the failure to file a timely appeal was the result of "excusable neglect." Since the appellant here received notice of entry of judgment, the district court's finding of excusable neglect is sustainable only if there were extraordinary circumstances that prevented a timely filing and denying the appeal would result in injustice. See, e.g., Meza v. Washington State Department of Social and Health Services, 683 F.2d 314, 315 (9th Cir. 1982); Oregon v. Champion International Corp., 680 F.2d 1300, 1301 (9th Cir. 1982) (per curiam);

National Industries, Inc. v. Republic National Life Insurance Co., 677 F.2d 1258, 1264 (9th Cir. 1982). We will reverse the district court's order only for an abuse of discretion. Meza, 683 F.2d at 315.

We have not previously addressed the question whether illness of counsel can amount to an extraordinary circumstance under Rule 4(a)(5). Cf. Meza, 683 F.2d at 316 n.3 (reserving the question). We conclude that illness of counsel entrusted with the filing responsibility may amount to extraordinary circumstances when the illness is so physically and mentally disabling that counsel is unable to file the appeal and is not reasonably capable of communicating to co-counsel his inability to file.

Appellees do not dispute the factual accuracy of the district court's findings

that the appeal would have been timely filed but for counsel's illness or that counsel's illness was of such a character and magnitude that counsel was both physically and mentally incapacitated during the crucial period of time. These conclusions are amply supported by counsel's sworn affidavit that his illness involved diarrhea, vomiting and a five pound weight loss over 36 hours. During the same period of time, moreover, counsel's secretary was taken ill.

Further, we note that counsel was not simply one of many attorneys responsible for the administration of this case. Cf. Meza, 683 F.2d 315 (other attorneys in the Assistant Attorney General's office could have filed the appeal); Gooch v. Skelly Oil Co., 493 F.2d 366, 370 (10th Cir.), cert. denied, 419 U.S. 997 (1974) (receipt of notice of entry of judgment

by one of two counsel of record precludes finding of excusable neglect); Buckley v. United States, 382 F.2d 611, 614 (10th Cir. 1967), cert. denied, 390 U.S. 997 (1968) (appellant represented at trial by four attorneys and two law firms); Flett v. W.A. Alexander & Co., 302 F.2d 321, 323 (7th Cir. 1962) (appellant represented at trial by two attorneys and only one was physically incapacitated). Rather, Mr. Smith was the only attorney actively representing Iran in the proceedings below. As for appellees' claim that the local rule of the district court required the active participation of local counsel, we note that neither the district court nor appellees attempted to enforce that rule. For example, the court's pretrial order showed only Mr. Smith as counsel for Iran. While we do not approve of the

practice of ignoring local rules, it would be unjust to penalize appellants now on the basis of a rule that has been violated but ignored throughout the proceedings.

Finally, the appellees do not claim any prejudice from allowing a late notice of appeal, and we think it would be unjust to preclude an appeal from the district court's near $100 million default judgment.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-3542, 84-3558
DC# CV 79-591 JCC
Western Washington
(Seattle)

ISLAMIC REPUBLIC OF IRAN, AIR FORCE
OF THE ISLAMIC REPUBLIC OF IRAN,
Plaintiffs/Appellants/
Cross-Appellees,
vs.
THE BOEING COMPANY and
LOGISTICS SUPPORT CORPORATION,
Defendants/Appellees/
Cross-Appellants.

ORDER

Before: KENNEDY, PREGERSON and NELSON,
Circuit Judges

Defendants' motion to dismiss appeal 84-3542 is granted. The explanation provided to the district court did not demonstrate excusable neglect for the failure to file a timely notice of appeal, and the grant of an extension of time under Fed. R. App. P. 4(a)(5) was unwarranted. See Rogers v. Watt, No. 80-3482, slip op. at 5863 (9th Cir.

Dec. 16, 1983) (en banc); Meza v. Washington State Department of Social & Health Services, 683 F.2d 314 (9th Cir. 1982). We therefore lack jurisdiction over the appeal and it is dismissed.

Defendants' cross-appeal 84-3558 is dismissed as moot in light of our disposition of appeal 84-3542.

MoCal 1/30/84

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C79-59-C

ISLAMIC REPUBLIC OF IRAN,
Plaintiff,
vs.
LOGISTICS SUPPORT CORP.,
Defendant.

VERBATIM TRANSCRIPT OF PROCEEDINGS,

before the Honorable JOHN C. COUGHENOUR, United States District Court Judge, at the United States Courthouse, December 30, 1983, 1:30 p.m.

TELEPHONE CONFERENCE BETWEEN:

HON. JOHN C. COUGHENOUR, U.S. District Court Judge;

THOMAS G. SMITH, ESQ.;

JOHN D. DILLOW, ESQ.;

Reported by Donald K. Philpott, Official Court Reporter.

THE COURT: This is in Iran vs. The Boeing Company. We have a Reporter here and you are on the speaker phone so that we can take the motions.

Mr. Smith, it is your motion. Why don't you go ahead.

MR. SMITH: Your Honor, I really don't have much more to say in terms of, you know, explaining what happened, than I have already said in my affidavit.

I would like to respond to what Boeing has said.

First of all, I was instructed, when I left The Hague, which I think was about the 10th or 11th of October, to file this notice of motion as late as possible. They told me that the reason for that was they wanted to have some settlement discussion with Boeing.

And subsequent to that I talked with Mr. Dillow over the telepohone and he

told me that Iran had asked to do something, which included preparing a possible purchase of the 747 aircraft, which Iran said nothing to me about.

I have had no further contact with anyone from Iran regarding this matter, except that I have written two reports to the office in Washington, D.C., and I had one meeting with Dr. Berasche, and he said nothing to me about this motion, which John told me about the other day on the telephone, and included in his position paper.

You know, I made this appeal in good faith. I don't know what my clients are intending to do, and I certainly would participate in any kind of procedure which --

THE COURT: Could you speak up.

MR. SMITH. --As I say, I made the motion, or would have filed the notice of

appeal in good faith. There was no attempt to pull the wool over the eyes of the Court, as I say, and I'm a little disturbed by what they say; I guess they are trying to make the best argument they can in their opposition.

As I say, I knew nothing about the motion before the Tribunal, and they suggest in their papers that if the timely failure to file, certainly wasn't a tactic on my part. I got sick and I, so sick, I simply was not concerned at all with what was going on in the office

Sixteen days' delay they mentioned in their opposition, was just due to my, first of all, going into a state of shock that I made that mistake, and then taking the time to clearly research and read the cases. And the rule only requires the motion be filed within the 30-day period

after the expiration of the original hearing date, which I have done.

I want to try to respond to a couple points I made in their brief. Specifically on page six they refer to the State of Oregon case, and the Court there in the quotation, they have talked about inadvertence of mistake of counsel. I think in that case the inadvertence was filing the notice of appeal on the court. Here there was no inadvertent mistake. It was simply my health which prevented the motion to be filed, and in fact I have no, I was just too sick to even think about calling up Mr. Mark Hall and asking him to do so.

The reason for a requestion for an extension filed within 30 days after the entry of the order of Judge Coughenour was because I intended to file it on time, but because of the necessity, on

page eight of their opposition papers, they say that the timing of Iran's motion suggests that I had some cases, appeal time had run. That, at least as far as I am concerned, is not true. I was told to file the notice of appeal. It would have been filed had I not been sick, and my clients have not communicated with me concerning this one way or another.

And as you know, Your Honor, I have had this problem all along.

Finally, on --

THE COURT: Let me make sure I understand one thing, Mr. Smith, and that is you had received instructions from your client to file a timely notice of appeal?

MR. SMITH: That is correct.

THE COURT: All right.

MR. SMITH: And in fact it would have been filed. In fact, I had it prepared

to go. I was trying literally to comply what they asked for and get it there on the last day because that's what they wanted.

They say on page nine of their opposition, at line 22, that Iran has apparently filed the instance of 4.485 motion here in an effort to initiate appeallate [sic] review so there is some judicial proceedings which can be stayed. I really don't know where they get that because there has been no collusion on my part with Iran, and I don't know that they can do something like that. I certainly would not go along with something like that if it had occurred.

And finally they make a statement which I simply don't understand, I think page nine, they say Iran is so moving to institute appeallate [sic] proceedings

which will never be concluded. I think that -- I don't understand that. No matter what happens, this proceeding is going to be concluded one way or another.

And the Ninth Circuit seems to be moving pretty fast. Basically there is only one reason this didn't happen, Your Honor: I was sick and I didn't do it. I have no excuses to offer. It is my fault. And the only excusable neglect on my part I was so sick and I didn't institute it.

THE COURT: All right. Mr. Dillow.

MR. DILLOW: Yes, Your Honor, thank you.

First of all, let me, I will tell the Court we do appreciate your hearing this matter on such short notice because it is important to the presentation of our position over in the Tribunal.

I'd like to, first of all, emphasize we are not suggesting that Mr. Smith is guilty of bad faith in doing what he has done. But he is acting here on behalf of Iran, and in fact it is Iran's motion before the Court. And I don't believe Mr. Smith has had any involvement in Iran's strategy and Iran's decisions on what to do in the Tribunal. In fact, I don't think he was aware what they had done until I told Mr. Smith that this week. The fact is Iran has moved before the Tribunal to not only have this matter stayed, which is what we said in our papers to the Court which we prepared on pretty short notice, but they have actually asked the Tribunal to order us to terminate this proceeding.

So on the one hand they are asking the Tribunal to order us and the United States to entirely terminate this

proceeding; the other hand, they are asking this Court for an opportunity to prolong this proceeding through the notice of appeal procedures.

I think that's important in the Court's exercise of its discretion in the instant motion.

THE COURT: Of course, Mr. Dillow, that would be the circumstance if a notice of appeal had been timely filed. They could then proceed to do what they wanted to do in the Tribunal or tried to do what they wanted to so, so that really what we have to focus on here is whether there has been a sufficient showing of excusable neglect to permit the late filing of a notice of appeal. It doesn't seem to me that the fact that they are doing what they are trying to do in the Tribunal really has much bearing on that question.

MR. DILLOW: Well, I guess, I think it does, Your Honor, because in fact they didn't do it in a timely fashion as far as filing the notice of appeal. They seemed to be pursuing the strategy of making an end run on the Court's final judgment and they are doing it in, I guess a very indirect way and a very disturbing way, which is to try to relitigate the whole thing over in the Tribunal.

THE COURT: What has happened with the money that was impounded?

MR. DILLOW: Well, Your Honor, that's a good question, becaue once a notice of appeal was not filed in this case and once no motion of any type was filed by Mr. Smith for so long after the appeal period ran, we have commenced efforts to enforce our judgment, to investigate the law on what our options are and to find

Iranian assets, and we have initiated contact with the Treasury Department to get that account unblocked.

Now, of course, we are faced with a motion that would at least call into question our ability to do that.

But getting back to Your Honor's question, I mean the standard here is excusable neglect. And the Ninth Circuit has been, I think, quite strict in applying that standard to excuses proffered by counsel for failure to file timely notices of appeal. In the Oregon, State of Oregon case they talked about the standard as being extraordinary circumstances where injustice would otherwise result if the relief is not granted. And we don't think that these facts remotely satisfy those standards even apart from the question of what Iran may have up its sleeve in the Tribunal.

There is no question here that Mr. Smith and Iran received the judgment in a timely fashion. They understood that it was incumbent upon them to file a timely notice of appeal if they wanted to appeal the judgment.

Now Mr. Smith indicates that, in fact as we said in our papers, Iran actually had advance notice of the form of judgment and the exact date it would be entered because we submitted a form of judgment in that fashion and Iran never objected. So they had lots of time to consider this question, even before the judgment was entered.

They apparently made a conscious tactical decision to delay filing their notice of appeal as long as possible. Now, they told Mr. Smith, apparently, that that was for settlement reasons. As I indicated in my affidavit to the Court

there were no settlement discussions at all during that period of time, not a single communication, written or oral, during that 30-day period or in the 20 days preceding the entry of the final judgment. And in view of what they were doing in the Tribunal I think that excuse is suspect. And I don't question at all they actually gave that to Mr. Smith, but even aside from the fact as to whether that excuse is valid or not, the fact is they made a wilful, conscious decision to wait until the last possible minute.

So they have actually voluntarily compressed their time to file this notice of appeal from 30 days to one or two days. And I think that fact alone prevents them from establishing extraordinary circumstances where injustice would result if this motion were denied.

Now, as far as Mr. Smith's illness is concerned, he indicates that he was ill on the 30th of November, which would be the 29th day, and the First of December, which would be the 30th day, the last day to file, and so was the secretary. The fact is Mr. Smith does have six other lawyers in his office, one of whom did have some involvement in this case. He has a staff there, apparently, according to his affidavit, the notice of appeal was prepared and ready to go; it was never filed. It was a simple matter of making a phone call either to his office to anyone there or to their local counsel here in Seattle, which is a large and competent firm, the Schweppe firm. This was not done. If this is anything, it is inadvertence and mistake of counsel, and as the Ninth Circuit indicated in the State of Oregon case, inadvertence or

mistake of counsel does not constitute excusable neglect, and there really hasn't been any explanation other than inadvertence by Mr. Smith why he waited the additional 21 days after the time ran by to bring this motion before the Court.

On all those facts, we submit to the Court that the standard which is very strict and is grounded on the policy of encouraging the finality of judgments, isn't remotely satisfied by these facts.

We would request whether the Court would even have discretion under these facts to grant the relief that Iran seeks.

THE COURT: All right. Anything further?

MR. SMITH: May I respond?

THE COURT: Yes, you may.

MR. SMITH: The case that we relied on primarily was the Metz case which I think the lawyer for whom the court says,

the appellate court said had a very cavalier attitude towards the case from apparently the beginning, and I think that the Court says in a footnote that the illness is under the right set of circumstances excusable neglect. And I think, Your Honor, you would agree although I have a very difficult client, I have bent over backwards to keep the Court and counsel informed of what's going on as best I can in representing them.

It is a matter which is a result of my illness. What Mr. Dillow says is true, I could have called the Schweppe firm, except the fact I was so sick that I was really not interested in anything except trying to stay alive. I had diarrhea, vomitting, going on continuously for 36 hours where I was very, quite ill.

As I said earlier, the 21 days' delay after the time ran, to prepare and to do proper research in preparing the motion, I really think that the unblocking of the account is neither here nor there as far as the outcome of this matter is concerned. Both Iran and Boeing have agreed that the account should be unblocked and Your Honor concluded that in the memorandum opinion. And I don't see that the efforts to unblock that account would be affected if the appeal is allowed because Boeing, I think, would still be obligated until the procedure is completed in all cases reach final judgment to hold that money in trust. I don't see it is really determined on this issue.

THE COURT: Are you saying that Iran has agreed that it will not oppose the unblocking of that account?

MR. SMITH: I have agreed on their behalf, Your Honor. Again, this is one of the problems I have. I tried to get them to tell me exactly what they want me to do, and I don't get any definitive answers.

As I told them back there, I'm in a position where I am before the Court and I must comply with not only the local rules but the federal rules of civil procedure, and I have to do things in a certain period of time and if you don't tell me to do, I have to act in what I consider to be your best interest. So that's why I agreed to that.

THE COURT: All right. But that has been agreed to?

MR. SMITH: Yes. I think that was in the pretrial order. It became a part of the memorandum judgment.

THE COURT: All right. Let me tell you what I am going to do. I have struggled with this considerably since we got the papers. And the struggle was prompted largely by the combination of tough standards in the Ninth Circuit and a profound feeling I have had of the professionalism that counsel have exercised through these proceedings.

And I am going to grant the motion. I find that there is excusable neglect and that the government of Iran has ten days in which to file a notice of appeal.

And I will prepare written findings which will recite my reasons for the order.

But I want to say to you, Mr. Smith, that had you conducted yourself differently during the course of this litigation I might very well have ruled differently.

MR. SMITH. I understand.

THE COURT: But I feel very strongly that trial lawyers should conduct themselves as gentlemen, and you have done that throughout this proceeding, as has counsel for Boeing. And it would, in my view, be tragic if you were to be confronted with a malpractice situation as a result of the failure to file this notice of appeal due to your illness.

MR. SMITH: I certainly appreciate your ruling, Your Honor. I thank you.

THE COURT: All right.

MR. SMITH: Does the 10 days start to run from today or the time of the entry?

THE COURT: I am going to recite it will start running from today.

MR. DILLOW: Could I ask a question, Your Honor?

THE COURT: Yes.

MR. DILLOW: Mr. Smith, does Iran plan on filing a supersedeas bond to, as part of their appeal?

MR. SMITH: I don't know. I will bring that to their attention right away.

THE COURT: All right. Thank you, Gentlemen.

MR. SMITH: Thank you, Your Honor.

MR. DILLOW: Thank you, Your Honor.

THE COURT: Good-bye.

(Telephone Conference Concluded.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CIVIL ACTION NO. C79-591C

ISLAMIC REPUBLIC OF IRAN, AIR FORCE OF THE ISLAMIC REPUBLIC OF IRAN,
Plaintiffs,
vs.
THE BOEING COMPANY and LOGISTICS SUPPORT CORPORATION,
Defendants.

ORDER GRANTING PLAINTIFFS' MOTION TO ENLARGE TIME FOR FILING NOTICE OF APPEAL

THIS MATTER comes before the Court on plaintiffs' motion to enlarge time for filing a notice of appeal. Upon due consideration of the pleadings, papers and argument herein, the motion is GRANTED.

Federal Rule of Appellate Procedure 4(a)(5) provides in relevant part:

> "The district court, upon a showing of excusable neglect . . . may extend the time for

> filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)."

Plaintiffs' motion for an extension of time was timely filed. Thus, the only issue before the Court was whether the failure to file the notice of appeal was due to excusable neglect.

In State of Oregon v. Champion International Corporation, 680 F.2d 1300, 1301 (9th Cir. 1982), the court noted that:

> "The standard for determining excusable neglect is 'a strict one.' . . . It was intended to apply only to 'extradordinary [sic] cases where injustice would otherwise result.'"

In this case it is undisputed that plaintiffs' counsel had prepared a notice of appeal which he had not filed pursuant to his client's instructions to wait until the end of the filing period. Unfortunately, plaintiffs' counsel was

taken ill two days before the filing deadline. Both orally and by affidavit counsel has informed the Court that he was so ill that he did not even think to call other counsel to insure that the notice of appeal was filed and that he did not recover and return to his office until several days after the filing deadline. Although defendants characterize these facts as a mistake or inadvertence on the part of plaintiffs' counsel, illness can be the basis for a finding of excusable neglect. Meza v. Washington State Department of Social and Health Services, 683 F.2d 314, 316 n.3 (9th Cir. 1982). In this case the Court notes that plaintiffs' counsel has always conducted himself as an officer of the Court as well as an advocate and has attempted to assist the Court notwithstanding the difficulties he encountered from his client in pursuing

this cause of action. The Court finds that the notice of appeal would have been timely filed if the physical and mental incapacity occasioned by counsel's illness had not prevented it. These circumstances constitute excusable neglect.

The Clerk of this Court is directed to send uncertified copies of this Order to all counsel of record.

DATED this 23rd day of January, 1984.

/s/
John C. Coughenour
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CIVIL ACTION
No. C79-591C

ISLAMIC REPUBLIC OF IRAN, AIR FORCE
OF THE ISLAMIC REPUBLIC OF IRAN,
Plaintiffs,
vs.
THE BOEING COMPANY and
LOGISTICS SUPPORT CORPORATION,
Defendants.

MEMORANDUM OPINION

THIS MATTER came on for hearing on August 5, 1983, for resolution of the Boeing Company's (Boeing) and Logistics Support Corporation's (LSC) counterclaims against plaintiffs Islamic Republic of Iran and the Air Force of the Islamic Republic of Iran (Iran). Pursuant to the Order of Default entered on June 14, 1983, and the decision of Iran not to contest the existence of a contract for the sale of four asphalt plants, Iran's liability as to defendants' counterclaims

has been established. The only issues before the Court relate to the amount of damages sustained by defendants as a result of Iran's breach of contracts. Through cooperation of counsel, all facts are either admitted or not in dispute. The Pretrial Order, as supplemented by the parties, is hereby incorporated by reference into this Memorandum Opinion.

There are six relevant contractual relationships between the parties: (1) LSC's operations support contract; (2) Boeing's support services contract; (3) LSC's ground communication systems agreement; (4) Boeing's spare parts agreements; (5) Boeing's asphalt plant contracts; and (6) Boeing's sale of a 747 freighter aircraft. Due to the revolution in Iran, the contracts were not performed. The parties have stipulated to much of the damages caused

by the breaches of Iran. The remaining disputes concern defendants' rights to recover damages associated with the relocation of personnel from Iran, the sale of spare parts, the resale of the 747 and loss of use of funds caused by Iran's nonpayment.

A. Relocation Expenses and Profits

At the time of the revolution, Boeing and LSC had a large number of persons stationed in Iran. Because of the emergency created by the revolution, the costs of evacuation were quite high. In paragraph 2.1.5 of amendment No. 12 to the operations support contract, Iran agreed that in the event the contract was not extended, Iran would pay LSC for "all actual costs associated with the relocation of its employees from Iran to the U.S.A.," in an amount not to exceed $16,900 per employee. The Boeing

operations support contract also contained a relocation expense figure of $16,900. Defendants seek their actual costs of relocation in excess of $16,900. In addition, defendants request the profits they would have made if the relocation had been as orderly as contemplated.

Iran contends the $16,900 figure represents a contractual ceiling on relocation expenses over which damages cannot be awarded. The Court disagrees. It is clear that when setting the figure, the parties intended an orderly, planned relocation. The events in Iran, however, necessitated expenses which greatly exceeded those previously estimated. These additional expenses were a direct result of Iran's breach. The general measure of damages for a breach of contract is that the injured party is

entitled to recover all damages that naturally flow from the breach and is to be put in as good a position as if the contract had been performed. See Diedrick v. School District No. 81, 87 Wn.2d 598, 609-10 (1976). The defendants are entitled to these reasonable expenses as the contract limitation was not intended to apply in the event of an emergency relocation. Moreover, the contracts expressly or impliedly provided that additional costs incurred by defendants as a result of excusable delay would be compensated for by Iran. See Article 5 of the LSC operations support contract (providing that LSC would be reimbursed for its increased costs due to excusable delay); Article 5.2 of the Boeing support services contract (impliedly providing for recovery in the event of excusable delay). In short,

under traditional contract law, the type of damages incurred by defendants should be awarded unless the parties provided otherwise. The Court finds that the parties have not so provided.

Defendants' claims for profits lost on the relocation is more problematic. Paragraphs 43 and 46 of the Pretrial Order, which Iran does not admit but does not contest, state that Iran understood that a profit margin was included in the $16,900 figure. The LSC contract, however, uses the terms "actual costs" and "not to exceed" $16,900. These factors indicate that the parties did not intend a profit should be made on relocation. Although either interpretation is possible, considering that Iran does not contest that all sides understood a profit was to be made on relocation, nor dispute the amount of

profit which would have been made, the Court must conclude that lost profits on relocation should be included in defendants' damage recovery.

B. Spare Parts

Boeing and Iran entered into a number of agreements concerning the purchase of spare parts. After Iran's breach, Boeing was able to resell many of the spare parts to other customers. Iran does not contest, however, that Boeing would have made these other sales even if Iran had performed. Boeing seeks the profits it lost by not selling the parts to Iran. Iran cotends [sic] that Boeing has been adequately compensated by receiving its profits on resale of the spare parts to other customers.

Both parties allege the answer to the issue is found in RCW 62A.2-708, the section of the Washington Uniform

Commercial Code dealing with seller's damages for non-acceptance or repudiation by the buyer. The measure of damages for non-acceptance or repudiation is usually the difference between the market price at the time and place for tender and the unpaid contract price plus incidental damages, but less expenses saved in consequence of the buyer's breach. 2-708(1). Where this measure of damages is inadequate to put the seller in as good a position as performance would have done, then the proper measure of damages is the profit the seller would have made from full performance by the buyer. 2-708(2). This second measure of damages based on lost profits is applicable to the "lost volume" seller, a seller who would have made the second sale of goods even if the original buyer had performed. See Famous Knitwear Corp. v.

Drug Fair, Inc., 493 F.2d 251, 254 (4th Cir. 1974). The example used in the Washington Comments to 2-708 is a car dealer who had to "use up" a customer to whom he otherwise would have sold a car, and was therefore entitled to the profit he would have made if the original buyer had bought the car.

The Court finds the present situation clearly within 2-708(2). In order to adequately compensate defendant, lost profits must be awarded. Although plaintiff originally asserted that Boeing's profits should be limited pursuant to the volume discount provisions of the spare parts contracts, Iran has conceded, and the Court so finds, those provisions inapplicable. The proper measure of lost profits are those specified in the Pretrial Order.

C. Damages on Resale of the 747

Iran agreed to purchase five 747 freighter aircraft and had accepted delivery and paid for four of the planes at the time of its breach. After plaintiff refused to accept the last 747, Boeing stored, modified and later resold the craft to another customer. In making the sale to the new customer, Boeing made price concessions from its specified sales price. These price concessions were made in the form of credit memoranda and excessive valuation of a trade-in received by Boeing from the customer.

To a specified extent, the customer may use the first set of credit memoranda to reduce the purchase price of the 747. The remainder of the credits can be used to reduce the price of other aircraft the customer had agreed to purchase or to purchase other Boeing spare parts, goods

and services. The second credit memorandum was in consideration for the customer agreeing to eliminate Boeing's liability for certain torts. The customer can utilize these credits for goods and services other than the aircraft. The final price concession was in the form of Boeing's acceptance of a used DC-10-40 at a price substantially in excess of the fair market value of the craft. If the customer does not wish to trade in the place, it may request that Boeing issue a specified credit memorandum. Boeing has the option of issuing the credits or demanding the plane.

According to the UCC, after a buyer has breached his contract, a seller may resell the goods and recover from the original buyer the difference between the resale price and the contract price, plus

incidental damages. The resale must have been made in good faith and in a commercially reasonable manner. See RCW 62A-2-706(1). Iran does not contest that the resale by Boeing was in good faith and in a commercially reasonable manner. Iran does contend that the resale price cannot reflect the credit memoranda or the amount the trade-in exceeded the fair market value of the craft. Such reductions in the resale price would allegedly constitute a double recovery, permitting Boeing to obtain not only the full benefit of its contract with Iran but also the profits on the additional purchases the customer will make with the credits. Boeing, on the other hand, asserts that the credit memoranda and trade-in are the equivalent of cash reductions in the resale price. Iran does not contest that the net financial

gain to Boeing from the use of credit memoranda as opposed to reductions in the gross sales price is the same. If the credit memoranda and trade-in cannot be reflected in the resale price, Boeing asserts that they constitute recoverable incidental expenses.

The determination of what constitutes the actual resale price must be a practical one. If Boeing had simply reduced the purchase price of the 747, Boeing's recovery from Iran would have reflected this reduction. Moreover, if Boeing had adopted a rebate policy, as is the current practice of automobile manufacturers, the rebate would be reflected in the recovery. Instead of making a straight price reduction or offering a rebate, Boeing determined to utilize a credit system. To the extent these credits may be used to offset

current obligations to Boeing, whether it be the purchase of the particular 747, the other aircraft the customer promised to buy, or any other contractual commitment, the practical effect of these credits is a dollar for dollar reduction for Boeing. The assumption underlying Iran's argument is that the credit memoranda and excess trade-in value would be used to purchase goods and services which the customer would not have purchased but for the additional funds. Thus, to the extent the customer is either obligated to make these additional purchases or would have made these purchases anyway, Boeing cannot be receiving a "double recovery." As the first set of credit memoranda and the excess trade-in value can be used to offset current obligations to Boeing, the resale price must reflect this

reduction. It is also fair to assume that the second credit memorandum, the one issued on consideration of release of tort obligations, would also be used by the customer to make necessary purchases.

Iran's position regarding the credit memoranda has been inconsistent. Although it argued in its papers that the contract price it was to pay Boeing should reflect the credit memoranda it received from Boeing, Iran sought to exclude the credit memoranda from the resale price. If a reduction in the contract price reflecting the value of the credit memoranda is appropriate, then a similar reduction must be made in the resale price.

The Court finds that Iran's argument regarding "double recovery" is speculative and unsupported. Iran has conceded that the net financial gain to

Boeing, using the credit memoranda and excess trade-in value, is the same as if Boeing had directly reduced the purchase price of the 747. Nor does Iran contest that the net purchase price to the customer is unreasonable or that the sale itself was unreasonable. In short, it appears that Boeing's efforts to mitigate its damages have resulted in a savings to Iran. Boeing is entitled to the damages it suffered from Iran's breach and such damages should reflect the full value of the credit memoranda and excess trade-in value.

D. Prejudgment Interest

The final damages issue before the Court is whether Boeing and LSC are entitled to recover interest on the funds now adjudged to be owed them by Iran. Boeing and LSC assert that such interest may be awarded either as actual damages

caused by the breach of contract or as prejudgment interest. The Court agrees with the latter theory.

The interest issue in this diversity case must be resolved in accordance with Washington law. Convoy Co. v. Sperry Rand Corp., 672 F.2d 781, 784 (9th Cir. 1982). Under Washington law, a successful plaintiff in a contract dispute is entitled to prejudgment interest for amounts found owing when that amount is objectively determinable by computation with reference to a fixed standard contained in the contract, without reliance upon opinion or discretion. United States v. Mountain States Construction Co., 588 F.2d 259, 263 (9th Cir. 1978) (citing Mall Tool Co. v. Far West Equipment Co., 45 Wn.2d 158, 176, 263 P.2d 652, 663 (1954)). The parties have agreed that this standard is

met in the case at bar. See Pretrial Order, Paragraph 30. An award of prejudgment interest is therefore appropriate.

The overwhelming weight of authority also establishes that Washington courts grant prejudgment interest at the rate set forth in RCW 19.52.010. See, e.g., Rogers Walla Walla, Inc. v. Willis Shaw Frozen Express, Inc., 23 Wn. App. 540, 547, 596 P.2d 669, 673 (1979); Foremost-McKesson Systems v. Nevis, 8 Wn. App. 300, 306, 505 P.2d 1284, 1288 (1973); Accord Elte, Inc. v. S.S. Mullen, Inc., 469 F.2d 1127, 1133 (9th Cir. 1972). RCW 19.52.010 (1981) provides, in pertinent part, as follows:

> Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing between the parties.

Because the contracts at issue in this dispute did not provide a rate of interest applicable to monies due upon contract breach, the Court is bound to apply the statutory rate. See Pretrial Order, Paragraph 32 (8 percent rate set out in LSC's Operations Support Contract does not apply to complete breach of payment obligations by Iran).

Contrary to the assertions of Boeing and LSC, the decision of Chan v. Smider, 31 Wn. App. 730, 736, 644 P.2d 727, 731 (1982), does not appear to authorize an award of interest at a rate higher than that set out in RCW 19.52.010 in breach of contract actions at law. In Chan, the award of interest beyond that dictated by statute was an element of an equity court's judgment in a suit for specific performance of a real estate contract. Moreover, the rate of interest applied by

the court was that rate which the parties had agreed to as applicable to other aspects of the contract. Both these factors substantially distinguish Chan from the case at bar.

The Court is also unpersuaded by the argument that RCW 19.52.120 (1981), which exempts deferred payment sales contracts from the usury laws of chapter 52, allows an award of interest in excess of the statutory rate for the deferred payment contracts in this dispute. The Washington Court of Appeals has indicated that RCW 19.52.120 has no retroactive application to contracts entered into prior to May 8, 1981. Topline Equipment, Inc. v. Stan Witty Land, Inc., 31 Wn. App. 86, 91, n.3, 639 P.2d 825, 829 (1982). Even if RCW 19.52.120 were retroactively applied, the purpose of that statute may hardly be interpreted to

preclude continuing reliance on RCW 19.52.010 as the "legal rate" of prejudgment interest in the absence of contractual agreement of the parties.

The Court therefore awards Boeing and LSC prejudgment interest at the statutory rate. Because RCW 19.52.010 provided a rate of interest at 6 percent until its amendment effective July 26, 1981, the Court must limit the prejudgment interest award to 6 percent from the time the various monies became due (See Pretrial Order) until July 26, 1981. An award of 12 percent is hereby granted for the period from July 26, 1981 until entry of judgment. See Convoy v. Sperry Rand Corp., 672 F.2d at 787.

E. Blocked Funds

Finally, all parties seek an order from this Court directing the United States Department of the Treasury to

release certain Boeing funds they had ordered blocked. These funds represent credits Iran had received on the trade-in of planes to Boeing. Considering that all parties join in this request and no prejudice can result from release of the funds, the Court is confident that the Department of the Treasury will be willing to unblock the account. No order should be necessary.

The Clerk of this Court is instructed to send uncertified copies of this Memorandum Opinion to all counsel of record. Counsel for defendants is directed to prepare a form of judgment reflecting the Court's Opinion.

DATED this 6th day of October, 1983.

/s/
John C. Coughenour
United States District Judge

Hon. John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CIVIL ACTION
No. C79-591C

ISLAMIC REPUBLIC OF IRAN, AIR FORCE
OF THE ISLAMIC REPUBLIC OF IRAN,
Plaintiffs,
vs.
THE BOEING COMPANY and
LOGISTICS SUPPORT CORPORATION,
Defendants.

FINAL JUDGMENT

THIS MATTER having come on regularly for hearing on August 5, 1983 for resolution of certain Counterclaims asserted by defendants The Boeing Company ("Boeing") and Logistics Support Corporation ("LSC") against plaintiffs Islamic Republic of Iran and the Air Force of the Islamic Republic of Iran ("Iran") and the Court having considered the stipulations and admissions contained in the agreed Pretrial Order, together

with agreed supplements to the Pretrial Order, and having reviewed the pleadings and records on file, having heard the argument of counsel, and being fully advised in the premises, NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED, in conformity with the Court's Memorandum Opinion dated October 6, 1983, that Boeing and LSC be, and hereby are, awarded judgment on certain Counterclaims against Iran as follows:

I. Boeing's FIRST COUNTERCLAIM against Iran in Civil Action No. C79-1231C:

Damages $23,592,373.00 Prejudgment Interest $9,938,425.00

II. Boeing's SECOND COUNTERCLAIM against Iran in Civil Action No. C79-1231C:

Damages $2,568,000.00 Prejudgment Interest $1,399,775.00

III. Boeing's THIRD COUNTERCLAIM against Iran in Civil Action No. C79-1231C:

Damages $1,729,000.00 Prejudgment Interest $842,338.00

IV. Boeing's FIFTH COUNTERCLAIM against Iran in Civil Action No. C79-1231C:

Damages $1,252,000.00 Prejudgment Interest $810,238.00

V. LSC's FIRST COUNTERCLAIM against Iran in Civil Action No. C79-591C:

Damages $18,178,000.00 Prejudgment Interest $9,005,185.00

VI. LSC's SECOND COUNTERCLAIM against Iran in Civil Action No. C79-591C:

Damages $1,058,000.00 Prejudgment Interest $536,363.00

TOTAL DAMAGES: $48,377,373.00
TOTAL PREJUDGMENT INTEREST: $22,532,342.00

The Court also determines that there is no just reason for delay and expressly directs immediate entry of this Judgment.

DATED: November 1, 1983

/s/
DISTRICT COURT JUDGE

Presented by:

PERKINS, COIE, STONE,
OLSEN & WILLIAMS

By /s/
John D. Dillow
Vernon L. Woolston, Jr.
Attorneys for Defendants
The Boeing Company and
Logistics Support Corporation

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-3558
DC CV 79-591 JCC

ISLAMIC REPUBLIC OF IRAN, AIR FORCE
OF THE ISLAMIC REPUBLIC OF IRAN,
Plaintiffs-Appellees,
vs.
THE BOEING COMPANY and
LOGISTICS SUPPORT CORPORATION,
Defendants-Appellants.

JUDGMENT

APPEAL from the United States District Court for the WESTERN District of WASHINGTON (Seattle).

THIS CAUSE came on to be heard on the Transcript of Record from the United States District Court for the WESTERN District of WASHINGTON (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District

Court in this Cause be, and hereby is affirmed.

Filed and entered August 02, 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-3542, 84-3558

ISLAMIC REPUBLIC OF IRAN, AIR FORCE
OF THE ISLAMIC REPUBLIC OF IRAN,
Plaintiffs-Appellants
Cross-Appellees,
vs.
THE BOEING COMPANY and
LOGISTICS SUPPORT CORPORATION,
Defendants-Appellees
Cross-Appellants.

ORDER

Appeal from the United States
District Court for the
Western District of Washington

Before: KENNEDY, PREGERSON, and NELSON,
Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The status of the proceedings in the Hague are not relevant to this court at this stage of the proceedings.

Entered October 22, 1984

[Filed December 14, 1983]

IN THE NAME OF GOD

The Iran-United States Claims Tribunal
The Hague, The Netherlands

Case No. 222

The Boeing Company and its Subsidiaries,
Logistics Support Corporation,
Boeing Technology International Incorporated,
Boeing Construction Equipment Company,
Claimants,

The Islamic Republic of Iran Air Force,
Respondent.

Motion to require the United States - as the signatory of the Algerian Declarations and as the Government through the Diplomatic protection of which the U.S. nationals have access to the Tribunal - and the Claimants to terminate and withdraw the claims and any proceedings thereof, initiated against the Respondent in the United States.

Honourable Arbitrators:

The Islamic Republic of Iran Air Force by virtue of Article 26 of the Tribunal Rules requests the Tribunla, [sic] to require the United States - as the signatory of the Algerian Declarations and as the Government through the diplomatic protection of which the U.S. nationals have access to the Tribunal - and the Claimants to terminate and withdraw the claims and any proceedings thereof, initiated against the Respondent in the United States. Boeing et al have submitted to the Tribunal a Statement of Claim wherein they raise a number of baseless claims. Now, in this very Statement of Claim, Claimants expressly state that they have previously filed against Respondent claims with the United States courts which are being processed. In view of the fact that the actions

taken by Claimants are improper both for its incompatibility with the Algiers Declarations and from the viewpoint of legal logic, which denounces the institution of proceedings for the same claim with two forums, and may lead to the conclusion of diverse findings and create hindrances for the enforcement of the Tribunal's award, the Tribunal is requested to establish an interim measure requiring the Government of the United States and the Claimants to terminate any actions with the United States courts and any proceedings thereof.

a. NON-JURISDICTION OF THE UNITED STATES COURTS

Under Paragraph 2 of Article VII of the Claims Settlement Declaration, claims referred to the arbitration tribunal shall as of the date of filing of such claims with the Tribunal, be considered

excluded from the jurisdiction of the courts of Iran, or of the United States or of any other court. In view of the foregoing and the express wording of the Declaration, it may be concluded that the Claimants are by no means entitled to bring the same suit both to the competent Tribunal and to a United States court which lacks jurisdiction, and thus to openly violate the Algiers Declarations. It is to be emphasized that no United States court is competent to entertain this claim after the filing with the Tribunal of the claim in question.

b. INCOMPATIBILITY WITH THE ALGIERS DECLARATIONS

The Claimants expressly state in the Statement of Claim filed with the Tribunal that they have submitted the same claims to the United States courts as counterclaims, and that Claimants

follow up the proceedings. The actions by the Claimants are in plain contravention of the Declaration of Algeria as explained herebelow:

1. Paragraph B of the General Principles provides:

> ". . . the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."

2. Paragraph 1 of Article II of the Claims Settlement Declaration clearly establishes the forum for entertainment of such claims and openly points out that the forum shall decide the claims and counterclaims of either party.

3. Paragraph 2 of Article VII of the Claims Settlement Declaration expressly announces the incompetence of all courts to decide a claim after the filing of the claim with the Tribunal.

c. IMPROPER CONCLUSIONS RESULTING FROM THE PROCEEDINGS IN THE UNITED STATES COURTS

1. Investigation in two forums may lead to diverse findings, and the great losses and damages to Respondent will be the inevitable result.

2. In the event the United States court precedes the Tribunal in reaching a verdict against Respondent, Claimants will immediately proceed to attach the property of Iran on the strength of the verdict. This may inflict damages on Respondent which may prove irreparable.

Therefore, whereas:

(1) The claims initiated before the U.S. courts are the same as those pending before the Tribunal.

(2) Continuation of the U.S. proceedings contravenes Principle B and generally violates the Algiers Declarations.

(3) The Claimant's actions contravene the provisions of the Algiers Declarations, including Article II, Paragraph 1 and Article VII, Paragraph 2 of the Claims Settlement Declaration. (None of the Algiers Declarations provide any jurisdiction for the U.S. courts similar to that which exists for Iranian courts according to Para. 2 of Article 1 of the Claims Settlement Declaration.)

(4) Continuation of the U.S. proceedings will disrupt a proper determination by the Tribunal, will cause costs,

problems and irreparable damages on Respondent and will unduly involve Iranian Ministry of Defence in several forums for the same cases, in addition to the fact that, the Government of Iran and other Iranian Respondents cannot properly defend their cases in the U.S. courts.

The Honourable Tribunal is respectfully requested to require the Government of the United States and the Claimants to terminate all claims against the Government of the Islamic Republic of Iran and Iranian Air Force filed with the United States courts, and any proceedings thereof.

Respectfully submitted,

Colonel Salimi,
Minister of National Defense,
Islamic Republic of Iran,

for Col. Afrakhteh

/s/

[Filed February 14, 1984]

IN THE NAME OF GOD

Iran-U.S. Claims Tribunal
The Hague
The Netherlands

Case No. 222

Parites: [sic] The Boeing Company and its Subsidiaries, Logistics Support Corpiration, [sic] Boeing Technology International Incorporated, Boeing Construction Equipment Company,

Claimants,

The Iranian Air Force,

Respondent.

REQUEST FOR AN ORDER REQUIRING THE UNITED STATES AND THE CLAIMANTS IN CASE 222 TO REFRAIN FROM TAKING ANY ACTION FOR EXECUTION OF JUDGMENT RENDERED BY THE DISTRICT COURT OF WASHINGTON PENDING THE TRIBUNAL'S DECISION ON THE MOTION BY THE AIR FORCE FOR AN INTERIM MEASURE

Honourable Arbitrators:

Pursuant to the Iranian Air Force's motion for an interim measure filed on 14 December 1983 and the Tribunal's Order of 2 February 1984, your attention is drawn

to the very fundamental points set forth herebelow:-

1- The Iranian Air Force is busy preparing its comments on the Memorandum filed on 20 January 1984 by Boeing et al and also with regard to the comments of the United States Government filed on 30 January 1984. The Iranian Air Force hopes that it would be able to submit its said comments for filing by 23 February 1984, the date fixed by the Tribunal for this purpose, in order that the Tribunal may be able to decide thereon on that date.

2- The Government of Iran and its controlled agencies unfortunately have no assurrance [sic] for justice and fair proceeding in the United States, and in order to defend the numerous claims unlawfully brought against them in contravention of principle "B" of the

General Declaration, by virtue of which the United States undertook to terminate and prohibit the raising of such claims, have no access to even the least possibilities.

The Government of the United States of America does not grant visa to the Iranian representatives and attorneys to enter the United States for interviewing and selecting competent attorneys and to attend the American courts. United States' failure and refusal in granting visa to the Iranian representatives, and other restrictions imposed in various ways on the Government of Iran, has deprived Iran of its right of defense in the U.S. courts. The best example of this matter is the sad fate of the instant case. In this case, due to reasons mentioned above, the Iranian Air Force did not have an effective

participation in the proceedings rather, perhaps it will be suprising [sic] if it is said that even the information concerning the said proceedings was obtained from the memorandum of Boeing and the comments of the United States of America.

Iranian Air Force, and the Government of Iran, in fact, did not have any control or supervision over the illegal and unfair claim of Boeing against Iran in the United States, and have not been able to defend themselves by preparing the necessary requisites for defense and by referring the matter to a competent lawyer.

3- Unfortunately, the judgment rendered by washington [sic] District Court on November , 1983, on the basis of the pre-trial orders, dated 8, 11 and 14 July 1983 (Exhibit C to Boeing's Memorandum)-

something which was never accepted nor consented to by the Iranian Air Force - is now going to be enforced.

4- With regard to the cases, including cases 160 and 10812, before receiving the comments of the Government of Iran and before making a decision on Claimants' requests based on the views of both parties the Tribunal has issued a preliminary and very urgent order. The object of issuing such orders was the fact that according to the Tribunal there was a possibility that an award might be issued by the Iranian courts against one of the parties.

In those cases no serious and immediate injury threatened the American parties. It was only possible that proceedings in Iranian courts would result in the rendering of an award possibly

infavourable [sic] to the aforesaid parties.

But in the instant case the situation is conspicuously and specifically of special significance and susceptibility, in the sense that the Claimants in Case 222, after proceeding with an inequitable and illegal action, are presently going to enforce the award of District Court of Washington with all their power and the extraordinary potentialities that they have in the United States. The enforcement of the judgment is going to be pressed against a government who, as a result of measures taken by the United States government, has been deprived of the right to present an adequate, effective, and fair defense. Consequently, at any moment it is possible that irreparable damages and

losses may be inflicted on Iran as a result of Boeing's actions.

5- These facts, which are a few among many, permit me to request that with due regard to the urgency and exceptional importance of the issue and in order to prevent irreparable loss to the Government of Iran and with due regard to the procedure adopted by the Tribunal in cases like 160 and 10812, the Tribunal, by an immediate interim order requires the Government of the United States and the Claimants in Case 222 to refrain from excuting [sic] the judgement issued by the American courts, pending receipt of the comments of the Iranian Air Force and Tribunal's decision with respect to the

motion for interim measure filed on December 14, 1983.

Yours sincerely,

/s/

Mohammad K. Eshragh,
Agent of the Islamic Republic of Iran
to the Iran-U.S. Claims Tribunal

Rule 4(a)(5), Fed. R. App. P.:

The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from date of entry of the order granting the motion, whichever occurs later.

GR 2(d), Local Rules W.D. Wash.:

Permission to Participate in a Particular Case

Any member in good standing of the bar of any Court of the United States, or of the highest Court of any other state, or of any organized territory of the United States, and who neither resides nor maintains an office for the practice of law in the Western District of Washington, may be permitted upon application and upon a showing of particular need to appear and participate in a particular case if there shall be joined of record in such appearance an associate attorney having an office in this District and admitted to practice in this Court who shall sign all pleadings

prior to filing and otherwise comply with CR (10)(e) hereof.

Such application shall be promptly filed with the Clerk and shall set forth: (1) the basis upon which "particular need" is claimed; (2) a statement that the applicant understands that he is charged with knowing and complying with all applicable rules; (3) a statement that the applicant has not been disbarred or formally censured by a Court of record or by a state bar association; and (4) a statement that there are no pending disciplinary proceedings against the applicant. This application shall be accompanied by a representation by local counsel that he is authorized and will be prepared to handle the matter, including the trial thereof, in the event the applicant is unable to be present upon any date assigned by the Court. Applications

filed under this rule must be approved by the Court.

Thomas G. Smith, Esq.
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Hon. John C.
Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CIVIL ACTION
No. C-79-591-C

ISLAMIC REPUBLIC OF IRAN, AIR FORCE
OF THE ISLAMIC REPUBLIC OF IRAN,
Plaintiffs,

THE BOEING COMPANY and
LOGISTICS SUPPORT CORPORATION,
Defendants.

Affidavit of Thomas G. Smith In
Support of Motion to Extend Date for
Filing Notice of Appeal Pursuant
to Federal Rule of Appellate
Procedure Rule 4(a)(5)

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

Thomas G. Smith, being first duly sworn deposes and says:

That I am an attorney admitted to practice before the Courts of the State

of California, and the United States Court of Appeals for the Ninth Circuit.

That I have been admitted to practice before this court pro hac vice and that I am the attorney who is representing the Islamic Republic of Iran and the Air Force of the Islamic Republic of Iran (hereinafter: "Iran") the above-captioned litigation.

That I am the only attorney from my law firm that has worked on this case for Iran (except Jeanette Shipman, Esq., who appeared for one production of documents by defendants).

That I was verbally instructed by representatives of Iran to file the Notice of Appeal in this action as late as possible because Iran was attempting to negotiate settlement with defendants.

That the 30 days within which to file the Notice of Appeal in this action

expired on December 1, 1983 because the Final Judgment was entered on November 1, 1983.

That a Notice of Appeal was prepared and signed by me and was being held to comply with Iran's instruction to file the Notice of Appeal as late as possible.

That on November 30, 1983 I intended to send by Federal Express the Notice of Appeal to the Clerk of the Court for filing on December 1, 1983. I did not go to my office on November 30, 1983 because I became very ill that day suffering from both diarrhea and vomiting, such that I lost 5 pounds in about 36 hours. I stayed at home in bed until Sunday evening, December 4, 1983. I returned to work on Monday, December 5, 1983. Due to my illness I did not think about the need to file the Notice of Appeal while confined to bed. My secretary did not

work on Wednesday November 30, 1983 because she was also confined to bed due to the same kind of illness I had. In fact, all other secretaries in my office, except one, were out at various times during this week due to illness. My secretary did not return to work until December 5, 1983.

As a result of the illness of myself and my secretary no one was aware that the Notice of Appeal was due and it was not sent for filing as I intended.

My illness caused me to be unaware of the fact the Notice of Appeal had not been sent out as I had intended and prevented me from realizing that local counsel in Seattle could have been called on the telephone and requested to file the Notice of Appeal.

It is respectfully requested this Court find that the Notice of Appeal was

not timely filed as a result of counsel's excusable neglect and enter its Order allowing Plaintiffs 10 days from the date of the Order within which to file a Notice of Appeal.

/s/
Thomas G. Smith

Subscribed and sworn to before me
this 21st day of December 1983.

(Seal)

/s/
Vikki Bay Myrick

Hon. John C. Coughenor

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CIVIL ACTION NO. C79-591C

ISLAMIC REPUBLIC OF IRAN, AIR
FORCE OF THE ISLAMIC REPUBLIC
OF IRAN
Plaintiffs,
vs.
THE BOEING COMPANY and LOGISTICS
SUPPORT CORPORATION,
Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Islamic Republic of Iran and the Air Force of the Islamic Republic of Iran, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth circuit from the final judgment entered in this action on November 1, 1983.

This Notice of Appeal is filed pursuant to an Order granting plaintiffs

above named an extension of time of 10 days from December 30, 1983 within which to file their Notice of Appeal.

DATED: January 3, 1984.

LAW OFFICES OF
STERNS, SMITH & WALKER
280 Utah Street
San Francisco, CA 94103

By /s/
Thomas G. Smith

SCHWEPPE, DOOLITTLE, KRUG,
TAUSEND & BEEZER

By _____
Mark Hough
Attorneys for Plaintiffs

Hon. John C. Coughenor

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CIVIL ACTION C79-591C

ISLAMIC REPUBLIC OF IRAN, AIR FORCE OF THE ISLAMIC REPUBLIC OF IRAN,
Plaintiffs,
v.
THE BOEING COMPANY and LOGISTICS SUPPORT CORPORATION,
Defendants.

NOTICE OF CROSS-APPEAL

NOTICE IS HEREBY GIVEN that The Boeing Company and Logistics Support Corporation, defendants and counterclaimants above-named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order granting plaintiffs' motion to extend time to file an appeal entered in

this action on the 30th day of December, 1983.

DATED this 12th day of January, 1984.

PERKINS, COIE, STONE,
OLSEN & WILLIAMS
JOHN D. DILLOW
VERNON L. WOOLSTON, JR.

By /s/
John D. Dillow
Attorneys for Defendants
and Counterclaimants

Rule 1(b), Fed. R. App. P.

Rules Not to Affect Jurisdiction. These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

Office-Supreme Court, U.S.
FILED
FEB 16 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1182

IN THE

Supreme Court of the United States

October Term, 1984

THE BOEING COMPANY and
LOGISTICS SUPPORT CORPORATION,

Petitioners,

v.

THE ISLAMIC REPUBLIC OF IRAN and
THE AIR FORCE OF
THE ISLAMIC REPUBLIC OF IRAN

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

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THE ISLAMIC REPUBLIC OF IRAN

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Is a challenge to the validity of Fed. R. App. P. 4, which in seventeen years has never been questioned by any court, such an "exceptional case" that it justifies review despite petitioners' failure to raise the issue below?

2. Is Fed. R. App. P. 4(a)(5) an unlawful expansion of federal court jurisdiction because it contains a broader definition of "excusable neglect" than an earlier procedural statute that it superseded?

3. Was the court of appeals required to hold that the district court abused its discretion by finding that a sudden incapacitating illness of counsel constituted excusable neglect under Fed. R. App. P. 4(a)(5)?

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STATEMENT OF THE CASE

The appeal in this case, now pending in the Ninth Circuit Court of Appeals, is from a $70,000,000 default judgment entered in favor of the Boeing Company and Logistics Support Corporation (jointly, "Boeing") against The Islamic Republic of Iran and The Air Force of the Islamic Republic of Iran (jointly, "Iran"). The default was ordered as a sanction for Iran's failure to furnish adequate discovery responses at a time when Iran was in a state of internal revolution, at war with Iraq and restricted by the United States government from having representatives in this country. The judgment was for the full amount of damages Boeing claimed, $48,000,000, plus $22,000,000 in prejudgment interest, on various claims Boeing asserted against Iran. (A-57-59)[1]

The district court's judgment was entered on November 1, 1983. (A-59) Because it feared that filing an immediate notice of appeal might jeopardize efforts to settle the action, Iran planned to file its notice of appeal on the last day, December 1, 1983. Accordingly, the only attorney then representing Iran, Thomas G. Smith ("Smith"), prepared and signed the notice of appeal to be sent by Federal Express on November 30 for delivery at the district court on December 1, 1983. Unfortunately, on November 30, 1983, Smith became so violently ill with diarrhea and vomiting that, as the district court found, he was physically and mentally incapacitated. He was in bed with this illness until Sunday, December 4, 1983, and did not return to work until Monday, December 5, 1983. As a result, Iran's notice of appeal was not filed by the December 1, 1983, deadline.

Iran then filed a timely motion to extend the time to appeal, relying on Fed. R. App. P. 4(a)(5), which authorizes the district court to grant an extension for "excusable neglect." The district court found that Smith's "physical and mental

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[1] The district court allowed Boeing to file and prosecute several permissive counterclaims even though Iran's original complaint had already been dismissed and despite the United States' agreement in the Algerian Accords to "terminate all litigation" in United States courts between United States nationals and Iran, and to refer all such litigation instead to the special neutral Iran-United States Claims Tribunal.

incapacity" constituted excusable neglect and granted Iran's motion. (A-31-34) Pursuant to the extension ordered by the district court, Iran filed a timely notice of appeal on January 4, 1984. (A-91) Boeing cross-appealed from the order extending Iran's time. (A-93)

On January 17, 1984, Boeing filed an "emergency motion" to dismiss Iran's appeal on the ground that Smith's illness "did not constitute excusable neglect." The court of appeals' motions panel, without hearing argument, and without setting forth any standard of review, found the extension "unwarranted," and granted Boeing's motion. (A-7-8)

On rehearing, after further briefing and argument, the same panel unanimously reversed itself. (A-1-6) This time it reviewed the district court's finding that Smith's incapacitating illness justified an extension of time under the appropriate abuse of discretion standard. (A-3) It held:

> We conclude that illness of counsel entrusted with the filing responsibility may amount to extraordinary circumstances when the illness is so physically and mentally disabling that counsel is unable to file the appeal and is not reasonably capable of communicating to co-counsel his inability to file.

(A-3)[2] Accordingly, the district court's order was affirmed, and Iran's appeal was reinstated to be heard on the merits. Boeing then filed a petition for rehearing, which was denied. (A-63) Iran's opening brief was filed with the Ninth Circuit on January 25, 1985.

In sum, Boeing has tried four times to convince the courts below to find that Iran was not entitled to an extension of time to appeal the $70,000,000 default judgment against it. It has failed, and the appeal is proceeding on the merits. Now Boeing asks this Court to review the question of the extension of time and to hold that the appeal was required to be dismissed after all.

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[2] Thus, Boeing's statement that the Court of Appeals "held that 'excusable neglect' was conclusively established by Mr. Smith's brief illness at home" (Pet. 7) seriously overstates the actual holding. (*See* A-3)

SUMMARY OF ARGUMENT

1. Boeing's principal contention is that the "excusable neglect" standard of Fed. R. App. P. 4(a)(5) impermissibly expands "jurisdictional limitations established by Congress" in 28 U.S.C. § 2107. This Court should refuse to review this contention for two reasons:

a. Boeing never raised this issue in either the district court or the court of appeals, and it has failed to demonstrate that this is an "exceptional case" justifying resolution by this Court in the first instance; and

b. 28 U.S.C. § 2107 is a procedural statute that codified a former procedural rule; it is not a grant of subject matter jurisdiction. Thus, by the explicit terms of 28 U.S.C. § 2072, Fed. R. App. P. 4(a)(5) supersedes its procedural predecessor.

2. The district court applied the proper standard in finding excusable neglect and extending Iran's time to appeal; the court of appeals held that the district court's decision was not an abuse of discretion. This Court should not review this discretionary decision based upon factual findings, especially because Boeing's factual contentions are baseless.

REASONS FOR DENYING THE WRIT

I.

BOEING'S CONTENTION THAT FED. R. APP. P. 4(a)(5) AND THE DECISION BELOW CONFLICT WITH 28 U.S.C. § 2107 IS WITHOUT MERIT

Boeing's principal contention is that the decision below and Fed. R. App. P. 4(a)(5) condone an unlawful expansion of federal court jurisdiction in conflict with 28 U.S.C. § 2107. This contention is baseless, and Boeing did not even raise it in either court below.

A. Boeing Failed To Raise The Point In Either Court Below.

Not once in Boeing's repeated and passionate challenges to Iran's extension of time to file the notice of appeal, did it

question the validity of Fed. R. App. P. 4(a)(5). Indeed, in the hundreds of pages of briefs it filed in support of its arguments in the courts below, Boeing never even mentioned 28 U.S.C. § 2107, the statute which is now the cornerstone of its petition for certiorari. This, alone, is a good ground for denying the writ.

This Court has repeatedly held that it will exercise jurisdiction over federal claims not raised below only in "exceptional cases." *See Hoover* v. *Ronwin,* ____ U.S. ____, 104 S.Ct. 1989, 1998 (1984); *Heckler* v. *Campbell,* ____ U.S. ____, 103 S.Ct. 1952, 1958 n.12 (1983); *Delta Air Lines, Inc.* v. *August,* 450 U.S. 346, 362 (1981); *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U.S. 430, 434 (1940); *Duignan* v. *United States,* 274 U.S. 195, 200 (1927).

Boeing's challenge to Fed. R. App. P. 4(a) is not an exceptional case. Rule 4(a) (or its predecessor, Civil Rule 73) has been in effect for seventeen years. Countless extensions of time to file notices of appeal have been granted since then, and many more will be granted in the future. Opponents of any one of those future extensions may challenge the propriety of Rule 4(a) in the proper manner, raising that challenge both in the district court and in the court of appeals before seeking review in this Court.[3] There is simply no reason for this Court to address Boeing's new theory without the benefit of any analysis of the question by either the district court or the court of appeal.[4]

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[3] This Court has denied certiorari in at least one case involving a conflict between Rule 4 and 28 U.S.C. § 2107. *See Griffith Co.* v. *NLRB,* 545 F.2d 1194, 1197 n.3 (9th Cir. 1976), *cert. denied sub nom Waggoner* v. *Griffith Co.,* 434 U.S. 854 (1977).

[4] Ironically, Boeing criticizes the decision below for adding to the number of appeals "when the dockets of the courts of appeals and the Supreme Court are already seriously overcrowded." (Pet. 13) At least the appeal "added" by the decision below promotes a resolution of the controversy on the merits. Boeing's petition, however, also adds to this Court's docket, but it does so to avoid a decision on the merits and it violates the policy against piecemeal review and the policy against raising issues that were not presented to the courts below.

B. Fed. R. App. P. 4(a)(5) Supersedes Its Procedural Predecessor, 28 U.S.C. § 2107.

Boeing argues that the extension of time to file the notice of appeal approved by both courts below is invalid because it was based on the "excusable neglect" standard of Fed. R. App. P. 4(a)(5) rather than the "excusable neglect based on a failure . . . to learn of the entry of a judgment . . ." standard of 28 U.S.C. § 2107. Boeing has it backwards.

Rule 4(a)(5) was promulgated pursuant to 28 U.S.C. § 2072, which empowers this Court to prescribe general rules of practice and procedure for the lower federal courts. Section 2072 provides that "[a]ll laws that conflict with such rules shall be of no further force or effect after such rules have taken effect." Therefore, to the extent there is a conflict between 28 U.S.C. § 2107 and Rule 4(a)(5), the expanded "excusable neglect" of Rule 4(a)(5) prevails.[5]

There is no doubt about this conclusion. Every federal court to consider the issue has held that Rule 4 supersedes any inconsistent provisions in Section 2107. *See Curacao Drydock Co.* v. *M/V Akritas,* 710 F.2d 204 (5th Cir. 1983); *Braden* v. *University of Pittsburgh,* 552 F.2d 948, 951 n. 12 (3rd Cir. 1977) (*en banc*); *Griffith Co.* v. *NLRB,* 545 F.2d 1194, 1197 n.3 (9th Cir. 1976), *cert. denied sub nom Waggoner* v. *Griffith Co.,* 434 U.S. 854 (1977); *Feeder Line Towing Serv., Inc.* v. *Toledo, P. & W. R.R. Co.,* 539 F.2d 1107 (7th Cir. 1976); *Hansen* v. *Trawler Snoopy, Inc.,* 384 F.2d 131 (1st Cir. 1967); *Cederbaums* v. *Harris,* 484 F. Supp. 125 (S.D.N.Y. 1980). *See generally* 9 J. Moore, Moore's Federal Practice ¶ 204.07 (2d ed. 1983). That should end the matter.

Boeing seeks to avoid the effect of Section 2072 by insisting that Section 2107 is a limit on federal court jurisdiction which is unlawfully expanded by the "excusable neglect" standard of Rule 4(a). This argument completely misreads the decisions of this Court.

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[5] The simple "excusable neglect" standard was adopted in the 1966 amendments to Civil Rule 73, the predecessor of Rule 4. This change became effective in 1968. In 1968, the new Federal Rules of Appellate Procedure incorporated this standard into Rule 4(a).

Although this Court has sometimes referred to the time limitations in *both* 28 U.S.C. § 2107 *and* Rule 4(a)(5) as "mandatory and jurisdictional," *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982); *Browder* v. *Director, Illinois Dep't of Corrections*, 434 U.S. 257, 264 (1978); *United States* v. *Robinson*, 361 U.S. 220, 229 (1960), these references do not mean that Section 2107 constitutes a grant of subject matter jurisdiction. Rather, the Court has simply held that since the rules themselves carefully circumscribe the permissible means of securing appellate review, courts must refuse appeals not brought in conformity with those rules:

> That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision.

United States v. *Robinson*, 361 U.S. at 229. Thus, the Court has used the word "jurisdictional" in this context, not in the Article III sense, but to emphasize that compliance with the rules is a "mandatory prerequisite to the exercise of appellate jurisdiction." *Haney* v. *Mizell Memorial Hosp.*, 744 F.2d 1467, 1472 (11th Cir. 1984); *Curacao Drydock Co.* v. *M/V Akritas*, 710 F.2d at 206-07. As Professor Moore explains,

> It is not jurisdictional in the sense of subject matter jurisdiction, for both the time limits and the circumstances in which they may be extended are fixed by the rules, and by their own terms the rules "shall not be construed to extend or limit the jurisdiction of the court of appeals as established by law." Mandatory preconditions as to the exercise of jurisdiction are often spoken of as jurisdictional, however, in the sense that absent compliance, the court can acquire no jurisdiction of the cause, through [sic] otherwise it is a case within its subject matter jurisdiction or, as it is sometimes called, "competence".

9 J. Moore, Moore's Federal Practice ¶ 204.02 [2] (2d ed. 1983).

This analysis is confirmed by *Griggs, supra,* in which the Court held that "1979 amendments [to Rule 4] avoided [a] potential conflict [between district court and appellate jurisdiction] by depriving the courts of appeals of jurisdiction in such situations." 459 U.S. at 60. If the Court were using "jurisdiction" in the strict sense urged by Boeing, Rule 4 could not have had that effect, because, as Boeing itself asserts (Pet. 11-12), the Federal Rules of Procedure may not "extend or limit the jurisdiction of the courts of appeals as established by law." Fed. R. App. P. 1(b).[6]

Indeed, even before the "excusable neglect" standard of Section 2107 was expanded in 1968, this Court recognized that "unique circumstances," beyond a party's failure to learn of entry of judgment, may justify a finding of "excusable neglect." *See Fallen* v. *United States,* 378 U.S. 139 (1964) (former Fed. R. Crim. P. 37(a)); *Thompson* v. *Immigration and Naturalization Serv.,* 375 U.S. 384 (1964) (*per curiam*) (former Rule 73); *Harris Truck Lines* v. *Cherry Meatpackers, Inc.,* 371 U.S. 215 (1962) (*per curiam*) (former Rule 73). *See also Wolfsohn* v. *Hankin,* 376 U.S. 203 (1964) (relying, without opinion, on *Thompson* and *Harris*). Obviously those decisions could not have been rendered if Boeing were correct in asserting that Section 2107 limits subject matter jurisdiction.

In sum, Boeing's argument confuses the Court's concern for compliance with procedural rules with a statutory grant of subject matter jurisdiction and seeks to invalidate a rule that for seventeen years has provided the basis for extending the time to appeal. Boeing cites no case that supports this result, and it is clearly wrong.

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[6] The Court has made clear that the Rule 1(b) restriction refers to subject matter jurisdiction. *See Mississippi Publishing Corp.* v. *Murphree,* 312 U.S. 584 (1946) (construing the comparable Fed. R. Civ. P. 83).

II.
THE DISTRICT COURT'S DISCRETIONARY FINDING OF "EXCUSABLE NEGLECT" DOES NOT WARRANT THIS COURT'S REVIEW

A. The Decision Below Neither Conflicts with the Law in Other Circuits Nor Announces New Standards

The district court found on uncontroverted facts that a sudden illness that caused counsel to be physically and mentally incapacitated constituted excusable neglect. The court of appeals held that this finding was not an abuse of discretion. Now, in an attempt to get this Court to review that discretionary factual judgment, Boeing claims that the decision below conflicts with other decisions and announces new and dangerous standards. (Pet. 13, 15) This is nonsense. The district court's finding and the court of appeals' affirmance of it are in harmony with both Rule 4(a)(5) and the cases applying it.

First, Boeing's claim that the Court of Appeals' decision "conflicts with the law in other circuits and the law established by this Court" (Pet. 13) is incorrect. This Court has held that the determination of "excusable neglect" by the district court should be accorded "great deference." *Harris Truck Lines* v. *Cherry Packers, Inc.*, 371 U.S. at 217. The courts of appeals have respected that holding, and uniformly have held that a district court's determination of "excusable neglect" will be reversed only for an abuse of discretion. *See United States* v. *Atkinson*, 748 F.2d 659, 661 (Fed. Cir. 1984); *McGarr* v. *United States*, 736 F.2d 912, 919 (3d Cir. 1984); *Campbell* v. *Bowlin*, 724 F.2d 484, 488 (5th Cir. 1984); *Meza* v. *Washington State Dep't of Social & Health Serv.*, 683 F.2d 314, 315 (9th Cir. 1982); *Benoist* v. *Brotherhood of Locomotive Eng'rs*, 555 F.2d 671, 672 n.1 (8th Cir. 1977); *Gooch* v. *Skelley Oil Co.*, 493 F.2d 366, 368 (10th Cir.), *cert. denied*, 419 U.S. 997 (1974). That is exactly the rule the court of appeals applied here; it simply held that the district court did not abuse its discretion. (App. A-3) Thus, there is no conflict in the law.

Second, Boeing's claim that the decision below is a "new interpretation of Rule 4(a)(5)" that will make late appeals "routine" (Pet. 15), is also incorrect. Obviously a determination of "excusable neglect" is dependent on the facts of the case and is not completely objective. It is clear, however, that under proper circumstances, incapacitating illness of counsel may constitute "excusable neglect" within the meaning of Rule 4(a).

In *Berman* v. *United States,* 378 U.S. 530 (1964), this Court held that the sudden illness of appellant's counsel on the last day to appeal did not constitute excusable neglect under the narrow definition then in effect. In 1966, specifically in response to *Berman,* the rule was amended to permit an extension based upon *any* excusable neglect, including illness of counsel. *See* 9 J. Moore, Moore's Federal Practice ¶ 204.13 [1.-3] (2d ed. 1983) (Rule 4(a)(5) was amended in response to *Berman); Oregon* v. *Champion Int'l Corp.,* 680 F.2d 1300, 1302 n.2 (9th Cir. 1982) (dissenting opinion) ("the Supreme Court amended the rule, in part, to avoid similarly harsh results in future cases" such as *Berman); United States* v. *Dabney,* 393 F. Supp. 529, 552 (E.D. Pa. 1975) ("the 'excusable neglect' provision of the Rule was added in 1966, in part to avoid the harsh results of cases such as *Berman* . . . . The sudden illness of counsel is clearly a circumstance covered by the 'excusable neglect' provision of the rule"). One member of the Advisory Committee that drafted the amendment to the rule wrote:

> This change was made because experience has revealed that there are a number of other situations in which tardiness is excusable and in which it is unfair to dismiss an appeal because of late filing of the notice. . . . Supreme Court decisions reveal other examples of *illness* or persons in prison in which the former rule was unnecessarily rigid.

Stern, *Changes in the Federal Appellate Rules,* 41 F.R.D. 297, 298-99 (1967) (emphasis added).

Thus, although it is difficult precisely to define "excusable neglect," it is clear that the rule was amended to overrule the "harsh" result of *Berman,* and to permit illness of counsel to satisfy the standard.

The dissent in *Berman* argued that:

> It is particularly abhorrent to think that such a rule can be enforced in the federal courts where, as here, the sole reason for cutting off the defendant's right of appeal to the Court of Appeals is the fact that, after the defendant has decided to appeal, the lawyer to whom he entrusts the duty of physically transporting his notice of appeal to the Court of Appeals fails to get it there because he is taken ill.

378 U.S. at 532 (Black J., dissenting). As a result of the 1966 rule change, that dissent is now the law. The drafters of the rule clearly intended that sudden illness of the attorney entrusted with filing the notice of appeal could constitute "excusable neglect." That is all the court of appeals held in this case.

B. Both Courts Below Properly Rejected Boeing's Factual Contentions.

Boeing's factual attacks on the decision below are equally insubstantial. Both the district court and the court of appeals considered Boeing's arguments and rejected them.

The court of appeals did not impose a new requirement upon Boeing to show that it would be prejudiced if Iran's appeal were allowed to proceed on the merits. (Pet. 15-16) All the court of appeals did, in the course of determining that denying the appeal would result in injustice, was to note that Boeing did not even claim that it would be prejudiced if the appeal were allowed. (App A-6)

Boeing also attacks the court of appeals decision, claiming that it allowed the extension of time without requiring an explanation of the inaction of Iran's other attorneys of record. (Pet. 16-18) This argument ignores the undisputed fact that Smith was the attorney solely responsible for filing the notice, and he was incapacitated to the point that he could not even

alert other counsel to the need for action. (App. A-3).[7] Moreover *Berman* itself also involved multiple attorneys who presumably could have replaced the one taken ill, yet the *Berman* situation is precisely what Rule 4(a)(5) was amended to accommodate.

Boeing also argues that Mr. Smith's plan to file the notice of appeal himself without obtaining local Seattle counsel's signature would violate the district court's local rules (Pet. 18), and that the court of appeals' rejection of this argument because "Iran had gotten away with a prior violation of the rule earlier in the case" is "incredible." (Pet. 18) This afterthought argument is inconsistent with Boeing's own conduct, and Boeing didn't even raise it in the district court.

First, if Iran "got away" with violating the rule earlier in the case, Boeing itself was Iran's principal accomplice. The pretrial order containing the stipulations that are the sole basis for Boeing's enormous judgment was prepared by Boeing for Mr. Smith alone to sign on behalf of Iran. Boeing did not even provide a signature line for local counsel to sign in compliance with the local rules.

Second, Boeing never objected to Smith's practice of signing Iran's pleadings in the district court. Obviously a claim based on an asserted violation of a court's own rules ought to be presented to that court in the first instance. Boeing, however, did not even mention this theory until the case was in the court

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[7] This, of course, distinguishes the cases Boeing relies upon for its claim that the existence of more than one attorney should have precluded a finding of excusable neglect. (Pet. 17) None of those cases involved an incapacitating illness, and two of them (*Buckley* v. *United States*, 382 F.2d 611 (10th Cir. 1967), *cert. denied*, 390 U.S. 997 (1968); *Flett* v. *W.A. Alexander & Co.*, 302 F.2d 321 (7th Cir.), *cert. denied*, 371 U.S. 841 (1962)) simply affirmed findings by the district court that there was no excusable neglect under the former, more restrictive standard. Those cases do not stand for the proposition that under Rule 4(a)(5) the illness of counsel can never constitute excusable neglect when there is another attorney who has participated in the case.

of appeals. Under these circumstances it is not at all "incredible" that the court of appeals rejected Boeing's attempt to throw out an appeal from a $70,000,000 judgment on such a technicality.

Nor is there anything to Boeing's claim that the decision below failed to consider Iran's alleged lack of due diligence and good faith. (Pet. 18-20) Iran postponed filing the notice of appeal to facilitate settlement efforts.[8] Unfortunately, as in *Berman,* counsel was suddenly taken ill on the last day. If Boeing's argument were valid there would always be a lack of "due diligence" unless counsel actually tried to file the notice of appeal on the first possible day and every day thereafter. That is unrealistic and would make the 30-day period meaningless.[9]

There is even less to Boeing's argument that Iran acted in bad faith in initiating the appeal. (Pet. 20) It is difficult even to understand what this means. Obviously Iran seeks a reversal of the judgment against it — that is what the appeal process is for and it is not bad faith to invoke it. Boeing apparently is complaining about Iran's assertion in the Iran-United States Claim Tribunal that the United States courts do not have jurisdiction over this action. But where is there any bad faith in that? The Claims Tribunal is the final arbiter of that question, and Iran could hardly be expected to abandon its position in that forum.[10]

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[8] Boeing's attempt to impugn Iran's motives by characterizing its decision to wait to file the notice as "an effort to achieve a perceived tactical advantage" in the litigation (Pet. pp. 18, 19) is baseless. The only facts in the record show that Iran simply believed settlement would be facilitated if the appellate process were not underway. That is a good motive, not a bad one.

[9] Boeing's complaint about the short delay after the time had run before Iran filed its motion for an extension of time makes even less sense. Rule 4 itself defines what is due diligence in this regard, and it provides a clear 30-day period within which the motion had to be made. Iran filed well within that period. Boeing's reliance on cases decided under Fed. R. Civ. P. 60(b) is misplaced, because there is no such period provided in that rule.

[10] Boeing knows better. It filed the same claims on which the judgment in this case is based in the Claims Tribunal as well. If protecting ones rights in both forums is bad faith, then Boeing is equally guilty.

Finally, Boeing challenges a comment made by the district court in the hearing on Iran's motion, claiming that the comment was an improper basis for granting Iran's motion. Boeing attaches undue significance to the court's comment. In its order granting Iran's motion, the court considered the proper factors and applied the correct standard. The court did consider counsel's conduct throughout the case, not because of concern about malpractice liability, but because such conduct was relevant to the credibility of counsel's claim of excusable neglect. (A-33-34)

Boeing is merely asking this Court to review the facts, and to reach a different conclusion than the lower courts. That is not the proper role for this Court.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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February 15, 1985

Office-Supreme Court, U.S.
FILED
FEB 25 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1182

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1984

THE BOEING COMPANY and
LOGISTICS SUPPORT CORPORATION,
Petitioners,

v.

THE ISLAMIC REPUBLIC OF IRAN, and
THE AIR FORCE OF
THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT TO COMPLY WITH RULE 28.1

Boeing and LSC have put a statement to comply with Rule 28.1 in their Petition for a Writ of Certiorari.

I. Iran Concedes That the Decision of the Court of Appeals Conflicts with 28 U.S.C. § 2107.

In their petition for a writ of certirorari, Boeing and LSC ask this Court to review a decision by the Ninth Circuit that clearly conflicts with the express language of 28 U.S.C. § 2107. Iran concedes that this conflict exists, but urges this Court to resolve the conflict in favor of the Ninth Circuit, on the theory that the express language of the conflicting statute has been supplanted by a more liberal court-made rule—Fed. R. App. P. 4(a)(5). The patent conflict between the Ninth Circuit's application of this Rule and the clear language of 28 U.S.C. § 2107 raises fundamental questions about the power of the federal judiciary to expand its jurisdiction beyond the limits expressly imposed by a congressionally enacted statute. The importance of this conflict makes it appropriate for resolution by this Court.

In its brief in opposition, Iran tries to minimize the importance of the conflict. At the same time, however, Iran is forced to acknowledge that the time limitations in Section 2107 have been described by this Court as "mandatory and jurisdictional." *See, e.g., Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 264 (1978). Similarly, Iran must concede that the Federal Rules of Appellate Procedure may not "extend or limit the jurisdiction of the courts of appeals as established by law." Fed. R. App. P. 1(b).

Iran raises two arguments in an attempt to justify the Ninth Circuit's decision. First, Iran argues that the term "mandatory and jurisdictional," as used by the Supreme Court, should be construed to mean "mandatory" but *not* jurisdictional. Iran's primary support for this troubling assertion is a speculative passage in the treatise of Professor Moore.[1] Moore's opinions

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[1]In view of his prominent role on the Advisory Committee responsible for drafting and revising Rule 4(a)(5), it is perhaps not surprising that Professor

are not controlling in this matter, however. In *Schacht v. United States*, 398 U.S. 58 (1970) this court carefully distinguished the kinds of time requirements that are jurisdictional from those that are not. The Court held that "procedural rules adopted by the Court for orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Id.* at 64. According to the Court, such rules are to be distinguished from statutes that contain time limitations enacted by Congress.

> Nor do I find it at all anomalous that this Court on occasion waives the time limitations imposed by its own Rules and yet treats time requirements imposed by statute as jurisdictional. As a matter of statutory interpretation, the Court has not presumed the right to extend time limits specified in statutes where there is no indication of a congressional purpose to authorize the Court to do so. Because we cannot "waive" congressional enactments, the statutory time limits are treated as jurisdictional.

Id. at 68 (Harlan, J., concurring).

Several legal commentators have also recognized this important distinction. *See* 16 C. Wright, A. Miller, *Federal Practice and*

Moore goes to great length in his treatise to reconcile the conflict between the rule and Section 2107 in a fashion that obscures the rule's constitutional infirmity. However, it is doubtful that Professor Moore would suffer the application of his treatise to support Iran's thesis that a jurisdictional statute can be overruled by an inconsistent court-made rule. In a section of the treatise not quoted by Iran, he makes a critical observation:

> The characterization "jurisdictional" is important, of course, in the interpretation of statutes, for a statute that is jurisdictional is not superseded by the rules.

9 J. Moore, *Moore's Federal Practice* ¶ 204.04 [2] at 4-16, n. 13 (2d ed. 1983).

Procedure 362-63 (1977) ("in civil cases where the time limitations for taking appeals and applying for certiorari are enunciated by Congress rather than by judicial rule, the Supreme court has consistently viewed compliance with the limitations as jurisdictional"); Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 78 (1984) ("[w]hile it is at least conceivable that Congress would implicitly delegate to the judiciary the authority to modify or limit a substantive statutory right or a jurisdictional grant, it is absurd to imagine that Congress would implicitly grant the courts authority effectively to repeal such legislation."); J. Moore, *supra*, n.1.

To the extent that Iran relies on *United States v. Robinson*, 361 U.S. 220 (1960) or *Fallen v. United States*, 378 U.S. 139 (1964), to support its argument that Rule 4(a)(5) supersedes Section 2107, it has misread those decisions. They are criminal cases, and Section 2107, by its terms, applies only to civil appeals. Neither *Robinson* nor *Fallon* purports to resolve any conflict between congressionally enacted time limitations and the Federal Rules of Criminal Procedure, since there was at the time of their decision no statute comparable to Section 2107 setting forth time limits for criminal appeals. Consequently, the circumstances under which a late appeal had to be pursued under the Federal Rules of Criminal Procedure cannot be understood to undercut the viability of Section 2107.

Finally, Iran cites *Harris Truck Lines v. Cherry Meat Pickers*, 371 U.S. 215 (1962) and *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964) in support of its argument that Section 2107 is not a jurisdictional statute. These cases do not stand for that proposition—the statute is not even addressed in the opinions—and the holdings have no application to the instant case. In both of these cases, the Supreme Court refused to deprive an appellant of his right to appeal where his failure to file a timely notice of appeal was a direct result of his justifiable reliance on an order entered by the district court extending the period to appeal. Iran cannot claim that its own default was caused in this

way since it did not even ask for an extension, much less receive one, until twenty-one days after the appeal period had expired.

As a second line of attack on the viability of Section 2107, Iran suggests that Congress, through the enactment of 28 U.S.C. § 2072, delegated to the judiciary the power to promulgate rules that could supersede "mandatory and jurisdictional" requirements enacted by Congress. This argument is similarly devoid of merit. Construing an earlier version of Section 2072 that contained essentially the same language on which Iran now relies ("[a]ll laws in conflict with such rules shall be of no further force of effect . . ."), this Court held: "An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction . . . ." *United States v. Sherwood*, 312 U.S. 584, 589-90 (1941). Although Boeing and LSC discussed this authority prominently in their petition, Iran fails to offer any response to it.

In sum, Iran's defense of the Ninth Circuit's decison turns on the theory that the time requirements of Section 2107, which this Court has consistently described as "mandatory and jurisdictional," were rendered obsolete and without effect when Fed. R. App. P. 4(a)(5) was adopted. Contrary to the suggestion in Iran's brief, the conflict between the Rule and the statute is not mooted by the passage of seventeen years—particularly when Congress demonstrated the statute's continuing validity by amending it last year. A court-made rule simply cannot supersede a jurisdictional statute. By ignoring this fundamental principle, the Ninth Circuit's decision does violence to the separation of powers and paves the way for additional incursions by the federal judiciary into what has heretofore been the exclusive domain of Congress.

II. The Question of Jurisdiction is Properly Before this Court.

Iran complains that Boeing and LSC raised different jurisdictional arguments below and cites numerous cases for the proposition that arguments not raised below are heard by the Court only in exceptional circumstances. None of the cases cited by Iran in

support of this argument involve jurisdictional questions. It is well settled that the parties may raise defects in jurisdiction at any time, as may the Court *sua sponte*. *Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398 (1979); *United States v. Storer Broadcasting Co.*, 351 U.S. 193, 197 (1956); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804). Therefore, the issue of the Ninth Circuit's jurisdiction is properly before this Court.

III. The Ninth Circuit's Interpretation of Rule 4(a)(5) Departs From the Law in Other Circuits and Seriously Undermines the Concept of Finality.

In their petition, Boeing and LSC demonstrated that in four important ways, the Ninth Circuit's decision is a dramatic and unjustified departure from the law in every other circuit under Rule 4(a)(5). If allowed to stand, the Ninth Circuit's decision will render the heretofore strict standard of "excusable neglect" virtually meaningless, will undermine the concept of finality, and will open the doors of the already crowded appellate courts to many more tardy appellants. As Iran asserts:

> Countless extensions of time to file notices of appeal have been granted. . . ., and many more will be granted in the future.

Brief in Opposition at 4. This Court should be concerned about a published opinion of a circuit court that dilutes the standard by which these "countless" extensions of time will be measured.

Iran responds to these concerns by trying to minimize the impact of the Ninth Circuit's decision. Iran argues that the determination of "excusable neglect" is necessarily dependent on the facts of each case and is largely subjective. Iran then characterizes Boeing's arguments as mere factual disputes that simply confirm this subjectivity and should not concern this Court. This superficial assessment misses the point. Each of the four arguments presented by Boeing and LSC goes to the very heart of the legal standard for establishing excusable neglect under Rule 4(a)(5).

And Iran's response to each of these arguments confirms just how far the Ninth Circuit has strayed from the legal standard that prevails in the other circuits.

(a) **Prejudice.** Significantly, Iran does not dispute that the addition of a prejudice requirement to the excusable neglect standard is a departure from the law of this Court and the other circuits. Iran's only response is to claim that the issue of prejudice was not a factor in the Court's decision. The absence of actual prejudice, however, was the *only* basis cited by the Ninth Circuit for its finding that the second prong of the excusable neglect standard—that injustice would result if the late appeal were rejected—was satisfied.[2] Thus the consideration of prejudice was not only relevant, it was *essential* to the court's decision. This new requirement should not become part of the judicial construction of Rule 4(a)(5), but it will if the Ninth Circuit's decision is allowed to stand.

(b) **Multiple Lawyers.** Iran does not cite a single case holding that the illness of *one* lawyer for a party excuses *all* of the party's lawyers from their responsibility for filing a timely appeal. Indeed, all other cases addressing the issue of multiple counsel have required *all* counsel of record to explain why they could not file a simple one-page notice of appeal. *See* Petition at 17. Iran's only response is to misstate the record by contending that Mr. Smith was its only counsel. Mr. Smith's own words belie this conclusion. In his affadavit in support of Iran's Rule 4(a)(5) motion, he stated, "My illness . . . prevented me from realizing that local counsel in Seattle *could have been called on the telephone and requested to file the Notice of Appeal.*" (A89) (emphasis added).

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[2]The court also referred to the "near $100 million default judgment" below. If the court considered the amount of this judgment to be relevant to Iran's claim to "injustice," it was clearly wrong. Relief under Rule 4(a)(5) should obviously not turn on the size of a party's claim. Nor should the entry of an order of default have any bearing on a party's entitlement to extraordinary relief under Rule 4(a)(5). A tardy appellant's claim to such relief should not be enhanced because

Finally, Iran does not deny that it violated the district court's local rule requiring the active and informed participation of local counsel. Nor does it deny that the notice of appeal would have been timely filed if it had simply complied with that rule.[3] This case hardly presents "extraordinary circumstances" of the kind that might justify an exception to the finality rule. A party that chooses to pursue litigation through multiple counsel in separate cities should not be allowed to ignore them in the context of a Rule 4(a)(5) motion. This Court should clarify and enforce the responsibilities of multiple counsel representing a single party.

(c) **Due Diligence.** Iran concedes that its counsel waited seventeen days *after* learning of the missed deadline before taking any action to pursue a late appeal.[4] ***Iran still offers no explanation whatsoever for this delay.*** Instead, Iran advances an extraordinary legal interpretation of Rule 4(a)(5) to justify it. Rule 4(a)(5) contains an absolute cut-off of thirty days after the expiration of the appellate period. The district court may not consider a motion made after that date, no matter what the excuse proffered by the tardy appellant. Iran now asserts that this 30-day

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it refused to comply with discovery orders below and was thereby foreclosed from offering certain evidence at trial. Significantly, Iran has not contested the validity of this default order in its appeal before the Ninth Circuit.

[3]Iran's claim that Boeing was an "accomplice" to Iran's previous violation of the local rule is surprising. First, Boeing obviously had no responsibility to see that Iran, which instituted this litigation, complied with court rules. Second, the document cited by Iran, the pretrial order, was drafted by *both* parties. Local Rule 16(g) (1983). Boeing's counsel merely typed up what both parties submitted as the final version. The signature of Iran's other counsel of record would have appeared on the document only if Iran had requested it.

[4]Iran seeks to impart "good" motive to its delay before the filing deadline by contending that it was for settlement purposes. In fact the record shows that no settlement negotiations, either oral or written, took place between the parties during the relevant period (A21-22).

period is also the standard by which to measure due diligence. According to Iran, it makes no difference what a party does after learning of the missed appeal deadline. That party is free to sit on that knowledge for up to thirty days after the deadline before taking any action. Not surprisingly, Iran cites no authority for this interpretation, since it flies in the face of the letter and spirit of Rule 4(a)(5). Rule 4(a) is designed to promote finality by requiring strict adherence to the time limitations for filing an appeal. It is intended to provide an exception only rarely and only for a truly deserving appellant. It is not intended to promote delays or to reward dilatory conduct. As a matter of law, a party who, with full knowledge of his mistake, waits for seventeen days before getting around to requesting relief does not deserve exceptional relief, whatever his excuse for the prior delay. Iran's position that compliance with the 30-day requirement conclusively establishes due diligence raises a simple legal question about the meaning of Rule 4(a)(5) that should be resolved by this Court.

(d) **Good Faith.** Iran does not dispute Boeing's argument that a party without a good faith intent to pursue an appeal is not entitled to relief under Rule 4(a)(5). Rather, Iran protests that its actions in the Claims Tribunal and in the courts below were consistent with a good faith intent to preserve its rights in both forums. This argument ignores the sequence of Iran's actions. Eight days after its counsel "learned" of the failure to file a timely appeal, Iran filed a motion in the Claims Tribunal to terminate or indefinitely stay all United States proceedings in this case. Nine days later Iran finally got around to filing its request for a late appeal in the district court. Iran apparently concluded that its prospects for preventing enforcement of Boeing's and LSC's judgment would be better if appellate proceedings were pending while it moved for a stay in the Tribunal. This would give the Tribunal an actual proceeding to stay and would avoid the defense that the controversy between Boeing and Iran had become res judicata. The district court was wrong, as a matter of law, in concluding that it could not consider these facts under Rule 4(a)(5). (A18)

IV. CONCLUSION

For the reasons stated above and in their petition, Boeing's and LSC's Petition for a Writ of Certiorari should be granted. Because of the simplicity of the issues involved, petitioners suggest that summary reversal may be appropriate. *See, e.g., Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982).

Respectfully,

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